82-1051

No.

Office-Supreme Court, U.S.
FILED
DEC 21 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PAUL BENDETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN J. POLLAK
(Counsel of Record)

JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Petitioner

December 21, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment to the Constitution, Rule 11(e) of the Federal Rules of Criminal Procedure, may be interpreted to permit individual district judges to reject, as a matter of policy, all plea bargains in which the Government and the defendant agree to a specific sentence.

> [The following two questions are presented in the Petition for Writ of Certiorari in *Dennis Mastro and Peter DeLamos* v. *United States*, No. 82-894. Petitioner hereby adopts them by reference.]

2. "Were Defendant's Sixth Amendment rights violated by rulings under Rule 801, Federal Rules of Evidence, whereby Defendants were not confronted by witnesses against them, but by tape recordings involving two men who were dead at the time of the indictment (but were nevertheless named as 'unindicted-co-conspirators'), and one 90-year old man named as a Defendant and co-conspirator (but who did not appear at the trial under a severance order based on his age and physical infirmities)?"

3. "Were Defendant's Fifth Amendment rights to a fair trial and due process of law violated by rulings under Rule 801, Federal Rules of Evidence, resulting in convictions on the basis of tape recordings of coerced and involuntary statements made by Defendants who were actually the victims of an extortion conspiracy but who, because of fear of severe or fatal injury to themselves or members of their families, pretended to complicity in a plan of their victimizers to share unlawfully in the profits of a Las Vegas restaurant-casino?"

PARTIES BELOW

Dennis Mastro and Peter DeLamos were co-defendants with petitioner Bendetti in the United States District Court for the District of New Jersey and were co-appellants on the consolidated appeals in the United States Court of Appeals for the Third Circuit. Messrs. Mastro and DeLamos have filed a separate petition for a writ of certiorari: No. 82-894, filed November 29, 1982.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties below	ii
Table of authorities	iv
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions	2
Statement of the case	3
A. Summary of proceedings below	3
B. The rejected plea bargain	4
C. The admission of tape recordings	6
Reasons for granting the writ	6
Conclusion	14
Appendices:	
A. Letter from Robert C. Stewart, Esq., United States Department of Justice, to the Honorable Frederick B. Lacey, United States District Judge, July 7, 1981	1a
B. Transcript of Proceedings in *United States* v. *Bendetti et al.*, Criminal No. 79-321 (D.N.J., July 13, 1981)	6a

TABLE OF AUTHORITIES

Cases: Page

Brady v. *United States*, 397 U.S. 742 (1970) 12
Lynch v. *Overholser*, 369 U.S. 705 (1962) 13
Santobello v. *New York*, 404 U.S. 257 (1971) 12, 13
United States v. *Adams*, 634 F.2d 830 (5th Cir. 1981) 10, 11
United States v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) ..... *passim*
United States v. *Bean*, 564 F.2d 700 (5th Cir. 1977) 9-12
United States v. *Escobar Noble*, 653 F.2d 34 (1st Cir. 1981) 11, 12
United States v. *Hamm*, 659 F.2d 624 (5th Cir. 1981) 11
United States v. *Hartford*, 489 F.2d 652 (5th Cir. 1974) 13, 14
United States v. *Moore*, 637 F.2d 1194 (8th Cir. 1981) 11

Constitutional and Statutory Provisions:

U.S. Const. amend. V 2
Fed. R. Crim. P. 11(c), *as amended* 13
11(d), *as amended* 13
11(e), *as amended* ..... *passim*
11(f), *as amended* 13

Legislative Materials:

H.R. Rep. No. 94-247, 94th Cong., 1st Sess. (1975) 8-10

Other Authorities:

Advisory Committee Notes to 1975 Amendments to Fed. R. Crim. P. 11, 62 F.R.D. 285 (1974) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

PAUL BENDETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Bendetti respectfully requests that the Court grant his petition for writ of certiorari to review the judgment of the court below affirming his criminal conviction in the United States District Court for the District of New Jersey.

OPINIONS BELOW

The court of appeals did not file an opinion. The Judgment Order affirming the convictions appears as Appendix A to the Petition for Writ of Certiorari filed by co-defendants Mastro and DeLamos (No. 82-894).

JURISDICTION

The Judgment Order of the court of appeals was entered on September 29, 1982 (Petition in No. 82-894, App. A). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated

October 22, 1982 (*id.* App. B). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Rule 11 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> "(e) *Plea Agreement Procedure*
>
> "(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> "(A) move for dismissal of other charges; or
>
> "(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> "(C) agree that a specific sentence is the appropriate disposition of the case.
>
> The Court shall not participate in any such discussions.
>
> "(2) *Notice of Such Agreement.* * * * If the agreement is of the type specified in subdvision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does

not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea." [As amended April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; April 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980.]

STATEMENT OF THE CASE

A. Summary of Proceedings Below

Petitioner Bendetti and his co-defendants Mastro and DeLamos were convicted in the United States District Court for the District of New Jersey (Frederick B. Lacey, J.) of violating certain Racketeer Influenced and Corrupt Organizations (RICO) provisions, 18 U.S.C. § 1962(c) and (d), by conducting, and conspiring to conduct, the affairs of a casino in Las Vegas, Nevada, through a "pattern of racketeering activity," involving travel and use of facilities in interstate commerce to promote, establish, and carry on unlawful hidden ownership and management of the casino. They were also convicted on eleven counts of substantive violations of 18 U.S.C. § 1952, by travelling or using facilities in interstate commerce to promote, establish, and carry on unlawful hidden ownership and management of the casino. The conspiracy of which they were convicted included—in addition to the three defendants—three "underworld crime figures." Two of these, Anthony Russo and his brother John Russo, were unindicted co-conspirators, both dead by the time of indictment. The third, Ruggerio Boiardo, had been indicted with defendants but, because of his age and infirm condition, was severed as unprosecutable before trial.

Petitioner Bendetti, like his two co-defendants, was sentenced to three years imprisonment and a fine of $25,000 on the § 1962(d) RICO conspiracy count, a concurrent term of three years and $25,000 on the § 1962(c) substantive RICO count, and a concurrent term of three years and $10,000 on the first § 1952 count. On the re-

maining § 1952 counts, sentence was suspended and a term of five years probation was imposed, consecutive to the prison terms.

On consolidated appeals, the court of appeals affirmed by order (Adams, Hunter, Becker, JJ.) and denied a petition for rehearing and suggestion for rehearing *en banc*. Issuance of the mandate has been stayed pending disposition of the petitions for writ of certiorari.

B. The Rejected Plea Bargain

Before trial, petitioner and his two co-defendants negotiated a "Type C" plea bargain with the Government—that is, a plea pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, in which the Government attorney "agree[s] that a specific sentence is the appropriate disposition of the case." By the terms of this plea, Bendetti and Mastro would plead guilty to one of the § 1952 counts and would receive a non-custodial sentence of five years probation and a $10,000 fine; DeLamos would plead guilty to a complaint in Nevada charging violation of Nevada Gaming Commission regulations, and the Government would move to dismiss the indictment against DeLamos; and all three defendants would execute a consent judgment to a civil RICO complaint under 18 U.S.C. § 1964(a), requiring defendants to pay $170,000 to the United States and enjoining defendants from engaging in any casino gambling activities.

At a status hearing on July 7, 1981, the Government presented to the court a letter from the Government Attorney in Charge and approved by the Chief of the Organized Crime and Racketeering Section of the Justice Department. In that letter, the Government set forth a number of considerations supporting the agreement for disposition of the case, including the defendants' submission of themselves to questioning by Government investigators and prosecutors. It also stated:

> "[T]he Government has been mindful of the fact * * * that it was the Russo-Boiardo element which insinuated itself into these defendants business venture. In contrast to the activities of the Russo-Boiardo group, these defendants did not engage in extortionate-type conduct, nor did they embark upon any grand design to form and implement a ubiquitous venture which would pervade and pervert the entire fabric of the gaming industry. As to them, there is no organized crime network to be dismantled." P. 3a, *infra*.

This letter is quoted in its entirety in Appendix A hereto.

At a hearing on July 13, 1982, Judge Lacey rejected the plea. He did not state that he was doing so because of any particular dissatisfaction with the elements of the plea bargain as applied to any or all of the defendants. Instead, he stated that he saw no "necessity" for any Type C pleas in his court. In particular, he said:

> "A (C) plea agreement in some districts may be a necessity but I never thought it was a necessity in this district and I still don't think so.
>
> "I have seen justice served full well by the kind of count disposition that this office has followed from time immemorial since I've been practicing law in this area. And when I was United States Attorney it worked just as well. And I just don't think it creates a healthy situation. And again, I reiterate I see no necessity for it and I don't think I'll go beyond that." Tr. July 13, 1981, p. 14; p. 11a *infra*.[1]

---

[1] In its brief in the court of appeals, the Government stated:

> "In light of the background of the case, *the sentence proposed* and the novelty of the prosecutor's recommendation in this district, the Court stated that it saw no necessity to accept the recommendation of a specific sentence by the government." Brief for Appellee at 12 (emphasis added).

In a footnote, the Government quoted a passage from the July 7, 1981, hearing in which the court had referred, with apparent disapproval, to the proposed sentences. The footnote then went on:

C. The Admission of Tape Recordings

[See Petition in No. 82-894]

REASONS FOR GRANTING THE WRIT

Rule 11(e) of the Federal Rules of Criminal Procedure does not, by its terms, authorize each individual district court judge to decide, as a matter of policy, that "Type C pleas"—pleas where the Government and the defendant agree "that a specific sentence is the appropriate disposition of the case"—are unacceptable in that judge's court. Nevertheless, some courts of appeals have indicated that Rule 11(e) grants individual judges such broad power, and the trial judge in this case, with the approval of the court of appeals, acted on the assumption that he was authorized to refuse any Type C plea. This Court should grant certiorari to resolve the extent of a judge's power to reject a plea bargain and should hold that district judges are not authorized to reject all Type C pleas, without regard to the particular features of the case before them.

"Those reasons, and others, were reiterated by the Court in its formal rejection of the tendered plea agreement on July 13, 1981. See Tr. of July 13, 1981 proceedings at 9, 11-14." Brief for Appellee at 12, n.2.

With due respect, the cited pages of the July 13, 1981, transcript—where Judge Lacey made his formal ruling on the plea bargain—do not repeat any expression of disapproval of the proposed sentences. The entire relevant colloquy at the July 13, 1981, hearing is quoted in Appendix B.

In petitioner's view, Judge Lacey plainly chose to rest his ruling on the assumed power of a District Judge to refuse to permit *any* Type C pleas in his court. At the very least, the record does not permit a finding that Judge Lacey would have made the same ruling had he felt obliged to accept Type C pleas as a general matter. The Court of Appeals made no such finding.

Construing a predecessor version of Rule 11,[2] the District of Columbia Circuit held that, while the Rule provides that a trial court "may refuse to accept a plea of guilty," there are limitations on a judge's discretion to reject a plea bargain. *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) (Leventhal, J.). The prosecutor in that case had agreed that the defendant could plead guilty to second degree murder and that a first degree murder charge would be dismissed. The trial judge decided that "under Rule 11 * * * it had the discretion to refuse the plea when it found that the crime was so heinous and the evidence of guilt so overwhelming that the public interest would be ill-served by a judgment of second degree murder, which it referred to as a 'tap on the wrist.'" 497 F.2d at 618. The court of appeals held that this decision was erroneous. It ruled, *inter alia*, that the district judge "cannot disapprove of [the prosecutor's] action on the ground of incompatibility with prosecutive responsibility unless the judge is in effect ruling that the prosecutor has abused his discretion." 497 F.2d at 622. It further ruled that "a judge is free to condemn the prosecutor's agreement as a trespass on judicial authority only in a blatant and extreme case." *Id.*

---

[2] Prior to the 1975 amendments, Rule 11 provided, in its entirety:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Quoted in *United States* v. *Ammidown*, 497 F.2d 615, 618 n.3. (D.C. Cir. 1973).

Ammidown stands for the proposition that a district judge may not reject a guilty plea merely because the judge disagrees with the prosecutor's assessment of the public interest. The decision is inconsistent with what occurred in this case—a district judge rejecting any Type C plea as a matter of policy, without any finding that the proposed plea inappropriately encroaches on the judge's sentencing authority and without any finding that the prosecutor has otherwise abused his authority.

In its brief in the court of appeals below, the Government attempted to distinguish *Ammidown* by contending that it was superseded by the 1975 amendments to Rule 11. The Government contended:

> "Under Fed.R.Crim.P. 11(e)(2), (4), the District Court may reject or accept a plea agreement reached by the parties. The intent of Congress in enacting the 1974 Supreme Court amendments to Rule 11(e) was to afford a district court complete authority to decide for itself whether it will permit parties to present a plea agreement to it." Brief for Appellee at 12-13.

The Government relied on the following excerpts from the House Committee Report on the amendments to Rule 11:

> "The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; *a court is free not to permit the parties to present plea agreements to it.*
>
> "* * * *
>
> "Rule 11(e) as proposed permits *each* federal court to decide *for itself* the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea

negotiations and agreements *if, and to the extent that,* the court permits such negotiations and agreements.[7a]

"[7a] Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit *any form* of plea agreement to be presented to it. * * *"

H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 6 & n.7a (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 678-79 & n.7a (emphasis as added by the Government below, see Brief for Appellee at 13).

This legislative history is not as clear as the Government would like. *Ammidown* was a controversial and well-publicized ruling by a distinguished federal judge. Yet neither the Advisory Committee Notes nor the House Committee Report quoted above state that the amended Rule was intended to repudiate that decision. Indeed, *Ammidown* was not cited in either place. The statements of the House Report are consistent with the view that Rule 11 was intended to leave the issue of the scope of the judge's discretion to reject plea bargains a matter for developing case law.

The Government's broad reading of the legislative history of Rule 11(e) as repudiating *Ammidown* is supported by the decisions of two circuits—the Fifth and the Eighth.

In *United States* v. *Bean*, 564 F.2d 700, 702-03 (5th Cir. 1977) (footnote omitted), the court stated:

> "While Rule 11(e) provided guidelines for plea bargaining procedure, the Rule does not contravene a judge's discretion to reject such a plea. * * * The drafters of the Rule intended for the judge to retain

> discretion in accepting plea bargains [citing H.R. Rep. No 94-247 and the Notes of the Advisory Committee [a]].
>
> "* * * *
>
> "In considering plea bargains, courts may be governed by the same broad standards that apply in sentencing. * * * Consistently, this circuit, as well as other circuits, has permitted the decision of the trial court as to sentencing to prevail except in extreme circumstances."

In an accompanying footnote, the Fifth Circuit rejected *Ammidown* in the following words:

> "* * * *
>
> "Since this case [*Ammidown*] was decided before Rule 11 was amended specifically to cover plea bargains, this decision may not represent the standards for accepting plea bargains under the new rule. In any event, we find unacceptable the District of Columbia standard that a court must accept the plea unless the bargain is 'such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.' * * * To our knowledge no other circuit has followed the District of Columbia in so drastically limiting the discretion of a judge in regard to plea bargains." 564 F.2d at 703 n.4.

See also *United States* v. *Adams*, 634 F.2d 830, 835 (5th Cir. 1981) (Rule 11(e) "does not in any way limit the judge's discretion in deciding whether to accept a plea agreement. We have held that this discretion is governed by the same broad principles as govern the trial judge's

---

[a] The Advisory Committee Notes to the 1975 amendments contain the following paragraph:

> "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge." 62 F.R.D. 285 (1974).

discretion in sentencing.") (citing, *inter alia*, *United States* v. *Bean*, *supra*).[4]

Similarly, in *United States* v. *Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981), the court affirmed the rejection of a plea bargain, although the trial judge had given no reason, stating: "Rule 11 does not require district courts to either accept a guilty plea or delineate its reasons for rejecting it." It added the following footnote:

> "Appellant places emphasis on *United States* v. *Ammidown* * * *.
>
> "The precedential value of *Ammidown* has been considerably diminished since the adoption of the 1974 amendments to Rule 11 that were intended to increase the discretionary authority of the district court in dealing with guilty pleas. See H.R. Rep. No. 94-247 [*supra*]." 637 F.2d at 1196 n.3.

By contrast, the First Circuit accepts the continued validity of *Ammidown*.[5] In a recent decision refusing to hold that the rejection of a plea bargain was an abuse of discretion, *United States* v. *Escobar Noble*, 653 F.2d 34 (1st Cir. 1981), the court did not rely on any notion that the trial judge's discretion under Rule 11(e) was essentially unlimited. It said:

> "This is not a case where acceptance of the plea agreement is both reasonable and necessary to secure a legitimate and important prosecutorial interest. See *United States* v. *Ammidown* * * *. * * * The only

---

[4] In a still later decision, the Fifth Circuit cited the *Ammidown* case in considering the circumstances under which a trial judge may deny a Government motion to dismiss a prosecution. *United States* v. *Hamm*, 659 F.2d 624, 628 n.15, 631 n.23 (5th Cir. 1981) (*en banc*). The *Hamm* decision, however, did not retreat from either *Bean* or *Adams*.

[5] Petitioner notes that *Ammidown* has not been questioned or modified in the District of Columbia Circuit.

> justification offered for the proposed plea agreement was that the possible sentence under a felony conviction 'would not be just' * * *. * * * [The prosecutor] presented no prosecutorial interests—obtaining evidence, avoiding a prosecution of uncertain success, or conserving prosecutorial resources—that would have been furthered by the plea bargain. The bargain he proposed was thus intended only to control sentencing, a matter ordinarily within the discretion of the court. Under such circumstances a court has wide latitude to reject a plea bargain. *Compare United States* v. *Bean*, * * *." 653 F.2d at 36-37.

The First Circuit's acknowledgment that a trial court has "wide latitude" to reject a plea bargain when the judge is dissatisfied with the sentence is irrelevant to the instant case, where the trial judge acted on a *different* basis: disapproval of Type C plea bargains in general, except perhaps in extraordinary circumstances. Furthermore, the prosecutor below did set forth valid prosecutorial interests—including both the defendants' cooperation in providing information and conservation of resources. See App. A hereto.

In *Santobello* v. *New York*, 404 U.S. 257, 261 (1971), this Court said:

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

See also *Brady* v. *United States*, 397 U.S. 742, 751-52 (1970).

Since plea bargains are such an essential part of the criminal process, this Court should resolve whether either the Advisory Committee or the Congress intended—or could lawfully have intended—to delegate to individual district court judges the power to refuse to consider a particular type of plea. The detailed provisions of Rule 11 are primarily aimed at ensuring that a guilty plea—whether or not part of a plea bargain involving other charges or the sentence—is made voluntarily and with sufficient information (Rule 11(c), (d), (e)(2)) and that there is a factual basis for the plea (Rule 11(f)), not at endorsing unlimited judicial discretion in rejecting pleas. It is one thing for a trial judge to exercise discretion on the facts of a particular case; it is quite another for the judge to develop his or her own rule of law that a certain type of plea is not acceptable in that judge's court. The resulting differences in procedure before different judges are inherently arbitrary.

This Court has stated, in *dictum*, that a criminal defendant does not have "an absolute right to have his guilty plea accepted by the court." *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962). Petitioner claims no such right. In *Santobello*, the Court said: "A court may reject a plea in exercise of sound judicial discretion." 404 U.S. at 262. This petition presents the question of what factors may be considered in the exercise of such discretion.

Even in the area of sentencing, where the scope of a trial judge's discretion has historically been broad, a trial judge can abuse that discretion by adopting an inflexible practice of imposing the maximum term permitted by law. In *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974), the court found that "[s]uch a policy is under no reasonable conception an exercise of judicial discretion." It continued:

> "As the Sixth Circuit has stated, '[a] trial court which fashions an inflexible practice in sentencing contra-

> dicts the judicially approved policy in favor of "individualizing sentences." ' United States v. Daniels, 6 Cir. 1971, 446 F.2d 967, 971, *quoting* Williams v. New York, 1949, 337 U.S. 241, 248 * * *. *See also* United States v. Baker, 2 Cir. 1973, 487 F.2d 360, where the court said: 'We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant' * * *." *Id.*

Given the importance of plea bargaining in the criminal justice system, the same requirement of individualized consideration must limit the exercise of discretion under Rule 11(e), particularly where the proposed plea bargain contains an agreement on the appropriate sentence.

The circuits have divided, as set forth above, on the scope of a judge's discretion under Rule 11. This Court should grant certiorari to consider whether Rule 11 in fact can be read to authorize individual district judges to engage in the kind of rulemaking that occurred in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted on Question No. 1. If the petition in No. 82-894 is granted, this petition should be granted on Questions Nos. 2 and 3.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)

JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Petitioner

December 21, 1982

APPENDIX A

[SEAL]

RCS:mkh

U.S. Department of Justice
Organized Crime & Racketeering Section
Room 635 Federal Building
970 Broad Street
Newark, New Jersey 07102
(201) 645-3975

Washington, D.C. 20530

July 7, 1981

Honorable Frederick B. Lacey
United States District Judge
Post Office & Courthouse
Newark, New Jersey 07102

Honorable Sir:

The following information is submitted in order to supplement the record of the proceedings on July 1, 1981.

This case has undergone a rather substantial metamorphosis since the indictment was returned over twenty-one months ago. The principal defendant, Ruggerio Boiardo, has been adjudged to be unfit to stand trial and cannot be prosecuted. A second defendant of importance, Philip Leone, has also been adjudged to be physically unfit to stand trial. A third important defendant, Vito Montemarano, has since been convicted in State court and, at age forty, is serving a prison sentence of some thirty-three (33) years. Thus, by late 1980, the case had been reduced, for practical purposes, to the three businessmen, who permitted the Russo Brothers and Boiardo to infiltrate their casino venture in Las Vegas.

As the case progressed, counsel for both sides entered into plea negotiations. By late January of 1981, a plea

agreement, similar to the instant proposal, was under very serious consideration by all parties. However, those negotiations broke down, as the case was wending its way through the appellate courts over the issue of representation. In late March of 1981, following the Third Circuit's decision, the plea negotiations were revived.

Since then, the negotiations have involved a new and rather significant aspect. On April 17, 1981, the three defendants submitted themselves to some five hours of questioning by investigators and prosecutors. Thereafter, Mr. Bendetti volunteered to meet with a group of agents from several offices in order to answer various questions. It should be noted that those sessions did not alter the Government's view about the merits of the instant prosecution nor about the guilt of the accused nor about the likelihood of obtaining a conviction at trial. The Government's position on these matters has remained exactly as it was at the date of indictment, and there has been no lessening of the Government's resolve to see that this matter is prosecuted to a satisfactory resolution.

What the several sessions did provide was a more precise factual basis with which to evaluate such factors as (a) the defendants' history (or, more particularly, lack thereof) with respect to other criminal activity, (b) the relative seriousness of their participation in the offense as opposed to that of the other participants, (c) their very substantial remorse and contrition, (d) their avowed willingness to assume responsibility for their conduct, and (e) factors in mitigation that might well influence a probable sentence following a conviction. All of these are relevant factors for prosecutorial consideration in evaluating the merits and formulating the specifics of a plea agreement. It has been this constellation of factors—together with such appropriate considerations as the desirability of a prompt and certain disposition of the case, and the very considerable expense which an estimated eight to ten week trial and the resulting appeals would

necessitate—which persuades the Government that the proposed disposition is appropriate.

The propriety of Rule 11(e)(1)(C) plea agreements, which seek to resolve every detail of a disposition, was established in 1975 with the revision of Federal Rule 11. The parties herein have availed themselves of the provisions of the amended Rule because the instant plea agreement involves a rather intricate and delicately constructed mosaic of interlocking provisions. These are designed to punish the defendants for the instant offense, to promote their rehabilitation, to prevent any future repetition on their part and to serve as deterrent to others who might otherwise be inclined to engage in similar conduct. While the Government considers that the package as proposed addresses adequately each of these desideratum, the ommission or alteration of any one component would substantially alter the overall desirability of the proposed disposition and render it unacceptable to the Government.

In evaluating the various considerations, the Government has been mindful of the fact (as established by both the Government's evidence and the results of the interview sessions) that it was the Russio-Boiardo element which insinuated itself into these defendants' business venture. In contrast to the activities of the Russo-Boiardo group, these defendants did not engage in extortionate-type conduct, nor did they embark upon any grand design to form and implement a ubiquitous venture which would pervade and pervert the entire fabric of the gaming industry. As to them, there is no organized crime network to be dismantled.

They did, however, conspire to evade and defeat the revenue and casino regulatory laws of the State of Nevada, and they did this in order to gain an economic advantage. The terms of the proposed plea agreement are carefully tailored to redress that particular situation. First, the guilty pleas vindicate the legitimate state in-

terest in maintaining the efficacy of the legalized gambling regulatory system as well as the overall federal interest in preventing the illegal use of interstate facilities in derogation of such a state regulatory system. Secondly, the imposition of five year jail sentences with execution suspended and maximum terms of probation protects the public's general interest in discouraging recividist behavior by Bendetti and Mastro, who were the Jolly Trolley's principal operating officers in Las Vegas. Thirdly, the regulatory systems of states such as Nevada and New Jersey are further protected by the terms of the civil judgment. The injunctive relief prohibits these defendants from any future involvement in the legitimate gaming industry—whether in Nevada, New Jersey or anywhere else. This injunctive prohibition has the singularly attractive feature of not being limited in duration, as would be the case with any period of parole or probation. Any breach of the conditions, however slight and whenever occurring, could be punished quickly and economically by a jail sentence. Fourthly, the remedial objectives of the RICO judgment in the form of a $170,000 settlement strips the defendants of the last vestiges of their unjust enrichment and further punctuates the adverse economic consequences flowing from the Jolly Trolley venture. Finally, as a matter of general deterrence, the collective impact of the criminal fines and penalties, together with the civil sanctions, is designed to give pause to any otherwise legitimate businessmen who might contemplate a similar criminal venture.

The Government believes that the proposed probationary terms pursuant to felony pleas by Bendetti and Mastro and the Nevada plea by DeLamos, together with the proposed civil sanctions and remedies, satisfy the multiple objectives of sentencing—while, at the same time, sparing the Government, the Court and the Public the very considerable expense of litigating this matter to a conclusion. Above all, the Government believes that

the proposed plea agreement is balanced, fair and efficacious.

Hopefully, this information will assist the Court in evaluating the merits of the proposed plea agreement. If the Court desires any further information, we will endeavor to provide it.

Respectfully yours,

/s/ Robert C. Stewart
ROBERT C. STEWART
Attorney in Charge

cc: Stephen M. Greenberg, Esq.
Elliott H. Vernon, Esq.
Oscar B. Goodman, Esq.
Frank T. Swain, Esq.
John J. Momet, Esq.
Richard T. Philips, Esq.

APPENDIX B

Transcript of Proceedings in District Court

July 13, 1981

[Caption omitted]

BEFORE:

The Honorable FREDERICK B. LACEY, U.S.D.J.

Appearances:

WILLIAM W. ROBERTSON, United States Attorney
By: WARREN ROBINS, Special Attorney
Department of Justice
For the Government

FRANK T. SWAIN, Esq.
For the Defendant Bendetti

STEPHEN M. GREENBERG, Esq.
For the Defendant Mastro

ELLIOTT H. VERNON, Esq.
For the Defendant DeLamos

RICHARD T. PHILIPS, Esq.
For the Defendant Montemarano

[2] THE COURT: All counsel are present?

MR. ROBINS: All counsel for the government are present, your Honor.

THE COURT: I asked counsel to be here today so I might state for the record my response to the tendered plea agreement.

By letter dated June 30, 1981, and marked at an earlier proceeding as Court Exhibit 1, the United States Attorney advised me of what is stated in this letter to be a "full and complete plea agreement" between the government on the one hand and the defendants Bendetti, DeLamos and Mastro on the other.

While the agreement on its face does not extend to the defendant Montemarano, the government advised me that acceptance of this agreement by the court would lead to dismissal of the case against Montemarano.

The government letter stated that the United States would accept a guilty plea from defendants Bendetti and Mastro to Count 5 [later revised by the court to read Count 6] of the indictment, a count charging a violation of the Travel Act, 18 U.S.C. 1952, carrying a maximum sentence of five years and a $10,000 fine. And the United States would, upon sentencing, then dismiss the remaining counts of the indictment against those defendants, Bendetti and Mastro.

Additionally, the government's position was [3] that "the following specific sentence would be the appropriate disposition." As to both Mastro and Bendetti, there would be a five-year probationary term with a suspended sentence and a $10,000 fine.

Another term of this agreement was that the defendants Mastro, Bendetti and DeLamos would at the time of sentencing enter into a consent judgment in a civil RICO complaint filed by the government "which demands joint and several liability on $170,000 divestiture of profits and a permanent injunction against any further participation in any activities related to casino-gambling enterprise."

Continuing the quote: "The divestiture is to be collateralized and paid in full within two years after entry of the consent judgment."

The letter then dealt with the defendant DeLamos, stating: "It is understood that defendant DeLamos will plead guilty to a complaint pursuant to the Nevada Gaming Control Regulations § 5-46-2:(E), and that, at the time of sentencing on that charge, the government will move for dismissal."

Inquiry by me of counsel when they appeared before me in court drew a response that Mr. Robins had been in touch with an appropriate official in the state of Ne-

vada and that while he had asked what the general run of sanctions was with respect to such an offense, he had not been advised.

[4] Continuing with the agreement further, the letter stated that: "It is further understood that this agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state or local prosecuting authorities, although this office will bring this agreement to the attention of other prosecuting offices, if requested."

The letter concluded with this paragraph: "No additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties."

Under date of July 7, 1981, the United States Attorney wrote as follows to me:

[Quoting of letter in Appendix A omitted.]

* * * *

[9] What we have here before me at this time then is, in effect, a submission before a formal submission under Rule 11, and given the view that counsel had taken in submitting this to me in the first place, I think counsel are entitled to have my response as if it had been placed before me formally under Rule 11.

[10] Rule 11 of the Federal Rules of Criminal Procedure, Subdivision E, "Plea Agreement Procedure," reads as follows:

"(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

"(A) Move for dismissal of other charges; or

"(B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with

the understanding that such recommendation or request shall not be binding upon the court; or

"(C) Agree that a specific sentence is the appropriate disposition of the case."

Now, we go to (2). "If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in Subdivision (e)(1)(A) or (C), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider [11] the presentence report. If the agreement is of the type specified in Subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant, nevertheless, has no right to withdraw his plea."

Subdivision (4) says: "If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afforded the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

In the letter of July 7, 1981, the government states that: "The propriety of Rule 11(e)(1)(C) plea agreements, which seek to resolve every detail of a disposition, was established in 1975 with the revision of Federal Rule 11."

I take it that the government is thus trying to bring to my atention that there is no novelty, thus, in their doing what they did here. My understanding, however, of what Mr. Robins responded to a question I put earlier was that this is a novel procedure for this office.

Has there been a (C) agreement tendered to [12] any judge in this district before?

MR. ROBINS: Your Honor, I believe so. There have been.

THE COURT: Who? To what judge and where?

MR. ROBINS: Judge, I'm under the impression that there was at least one—

THE COURT: At least one?

MR. ROBINS: Yes.

THE COURT: How many criminal cases have you had since 1975, in the hundreds?

MR. ROBINS: Numerous, your Honor.

THE COURT: None were ever so intricate or, to use the phrase in this letter, of such a "mosaic" that a (C) agreement was needed before?

MR. ROBINS: Your Honor, I was not in the office at that time, so I can't answer that question.

THE COURT: Well, you wrote the letter, didn't you?

MR. ROBINS: No, Your Honor, Mr. Stewart did.

THE COURT: All right.

As I've indicated when you gentlemen were in court before me on the first occasion, the abundant files in this case indicate the mighty resistance that the United States posed to every move made by the defendants in the case. The defendants wanted to transfer the case to Nevada and the [13] government opposed this most strenuously. The defendants wanted Mr. Goodman to represent the three of them, telling me that Mr. Goodman was most indispensable, the case could not proceed without their being represented by Mr. Goodman. The government resisted that, of course, and the defendants proved their point up to a point by taking the case to the Court of Appeals and thereafter to the Supreme Court. Needless to say, as we look at counsel table now, Mr. Goodman, the indispensable man, isn't here.

But suffice it to say that this is a turnabout in the government's posture of this case.

Someone brought to my attention that the United States Attorney, when interviewed following the first

meeting that I had with you gentlemen in this court, said, in effect, quote, now it's up to the court, close quote. Well, it doesn't become a matter of being up to the court until the United States Attorney first makes the basic decision to enter a plea agreement under Subdivision (C). And, as I've already intimated in my remarks, this is the very first time of all of the criminal cases placed before me that that office of the United States Attorney of the District of New Jersey has tendered a plea agreement to me. And I've had some very intricate criminal cases which terminated in pleas of guilty and others that, of course, went to trial. But never a (C) plea agreement. [14] I frankly question whether the policy is a good one for law enforcement.

I happen to be on the Advisory Committee of the Supreme Court for the Federal Rules of Criminal Procedure and I'm intimately familiar with all of these rules because I helped draft them. A (C) plea agreement in some districts may be a necessity but I never thought it was a necessity in this district and I still don't think so.

I have seen justice served full well by the kind of count disposition that this office has followed from time immemorial since I've been practicing law in this area. And when I was United States Attorney it worked just as well. And I just don't think it creates a healthy situation. And, again, I reiterate I see no necessity for it and I don't think I'll go beyond that.

So, gentlemen, if you do tender this to me in a formal fashion under Rule 11, which I take it is what the posture is at this time, what would happen if you did, I would reject it.

Now, let me see counsel up here at sidebar, please.

[A discussion is held at sidebar off the record.]

THE COURT: I've been advised that the letter was amended to read "Count 6."

[15] [A discussion is held at sidebar off the record.]

• • • •

FEB 4 1983

No. 82-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PAUL BENDETTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioner

February 4, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In addition to the questions presented in the original petition for writ of certiorari, this Supplement presents the following question:

4. Whether, under the Fifth and Sixth Amendments to the Constitution and Rule 44(c) of the Federal Rules of Criminal Procedure, a trial court may deny defendants joint representation by counsel of their choice despite an otherwise valid waiver by each defendant of potential conflicts of interest.*

---

* Petitioner considers this question to include the subsidiary question whether the trial court made a proper finding that petitioner did not validly waive the potential conflicts of interest.

TABLE OF CONTENTS

	Page
Question presented	i
Table of authorities	iv
Motion for leave to supplement writ of certiorari	v
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions	2
Statement of the case	3
Reasons for granting the writ	6
Conclusion	11
Appendices:	
A. District Court opinion (Sept. 3, 1980)	1a
B. Court of Appeals order of affirmance on interlocutory appeal (Jan. 19, 1981)	16a
C. Court of Appeals order denying petition for rehearing (Feb. 17, 1981)	17a

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970).. 10
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) ..... vi, 5
Flanagan v. *United States*, No. 82-374, 51 U.S.L.W. 3508 (U.S. Jan. 10, 1983) ..... *passim*
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) ..... vii, 2
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973) 2
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 7, 8
Mercer v. *Theriot*, 377 U.S. 152 (1964) ..... vii, 2
United States v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978) 9, 10
United States v. *Flanagan*, 679 F.2d 1072 (3d Cir. 1982) ..... *passim*
United States v. *Garafola*, 428 F. Supp. 620 (D.N.J. 1977) 9, 10

Constitutional and Statutory Provisions:

U.S. Const. amend. V 2, 6
U.S. Const. amend. VI 2, 3, 6
Fed. R. Crim. P. 44(c), *as amended* 3, 6, 7
28 U.S.C. § 1291 ..... vi, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1051

PAUL BENDETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully moves that the Court grant him leave to supplement his petition for writ of certiorari to present a new question upon which this Court has, subsequent to the filing of his petition, granted certiorari.

Petitioner filed a timely petition for writ of certiorari on December 21, 1982, seeking review of the judgment of the court of appeals that affirmed his conviction. That petition presents a question about the trial court's rejection of a plea agreement and adopts by reference two questions presented by co-defendants Mastro and DeLamos in No. 82-894. The petition remains pending, although the petition filed by Mastro and DeLamos was denied on January 10, 1983, 51 U.S.L.W. 3509.

Subsequent to the filing of the petition, this Court granted a petition for writ of certiorari in *Flanagan* v. *United States*, No. 82-374, 51 U.S.L.W. 3508 (Jan. 10, 1983). The *Flanagan* case presents two related questions that are essentially the same as an issue rejected on interlocutory appeal—by the same circuit court that decided *Flanagan*—in the instant case: Whether, under the Fifth and Sixth Amendments to the Constitution and Fed. R. Crim. P. 44(c), a trial court may deny defendants joint representation by counsel of their choice despite an otherwise valid waiver by each defendant of potential conflicts of interest.[1]

As the Statement of the Case in the attached Supplement demonstrates, petitioner and his two co-defendants, Mastor and DeLamos, were denied leave to have a single counsel of their choice represent them fully at trial. In an interlocutory appeal pursuant to 28 U.S.C. § 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), they brought that issue to the court of appeals, which affirmed the trial court ruling.[2] Defendants then petitioned this Court for writ of certiorari, but this Court denied the petition. *Bendetti et al.* v. *United*

---

[1] The petition in *Flanagan* states the two relevant questions presented as follows:

> "(1) Whether the [court of appeals'] opinion denying Petitioners counsel of their choice to present their common defense due to potential conflicts of interest, despite a valid waiver of such conflicts, is inconsistent with the decisions of this Court?
>
> "* * * *
>
> "(3) Whether Fed.R.Crim.P. 44(c) permits a court to undercut Petitioners' constitutionally protected choice of retained counsel?"

[2] The question presented on that appeal was:

> "Whether or not the defendants * * * have been deprived of their constitutional right to counsel of their choice and the effective assistance of counsel by the memorandum opinion of the court prohibiting Oscar B. Goodman, Esq., from participating in all stages of the trial of this matter."

States, 452 U.S. 938 (1981) (No. 80-1615). The trial went forward thereafter.

Petitioner and his two co-defendants did not again present the joint-representation issue to the court of appeals on review of their convictions. In part for that reason, the issue was not included in the December 21, 1982 petition for writ of certiorari. In light of the court of appeals' affirmance by order on both appeals and this Court's prior denial of certiorari, it appeared that to present the question again would be a redundant and futile gesture.

Now, however, the Court in *Flanagan* has decided to review a decision by the same circuit that affirmed petitioner's conviction, on an issue that was fully litigated in the trial court and on interlocutory appeal in petitioner's case. See attached Supplement. The instant petition is pending, and there is no jurisdictional bar to consideration of the joint-representation issue, since "it is settled that [the Court] may consider questions raised on [a] first appeal as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964), quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916).

For the foregoing reasons, petitioner respectfully requests that the Court grant him leave to supplement his petition for writ of certiorari with the attached Supplement.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES F. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

February 4, 1983

Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1051

PAUL BENDETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Petitioner Bendetti respectfully requests that the Court grant the petition for writ of certiorari, as supplemented herein, to review the judgment of the court below affirming his criminal conviction in the United States District Court for the District of New Jersey.

OPINIONS BELOW

The opinion of the district court on the question presented herein is reported at 498 F. Supp. 450, and is

reproduced as Appendix A hereto. The court of appeals did not file an opinion on the interlocutory appeal from that decision.

JURISDICTION

The judgment order of the court of appeals affirming, on interlocutory appeal, the district court's pretrial decision on the right-to-counsel issue presented by this Supplement was entered on January 19, 1981. After a timely petition for rehearing was denied on February 17, 1981, this Court denied a petition for writ of certiorari, 452 U.S. 938 (1981) (No. 80-1615). The judgment order of the court of appeals affirming the conviction was entered on September 29, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated October 22, 1982, and a timely petition for writ of certiorari was filed on December 21, 1982.

While the question presented by this Supplement was not presented to the court of appeals again on appeal from the conviction or in the pending December 21, 1982 petition for writ of certiorari, this Court has jurisdiction under 28 U.S.C. § 1254(1), because "it is settled that [the Court] may consider questions raised on the first appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer v. Theriot*, 377 U.S. 152, 153 (1964), quoting *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257 (1916). A prior denial of certiorari does "not establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution is quoted in the petition.

The Sixth Amendment to the Constitution provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Rule 44(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

"(c) *Joint Representation.* Whenever two or more defendants have been jointly charged * * * or have been joined for a trial * * *, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." [As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; April 30, 1979, eff. Dec. 1, 1980.]

STATEMENT OF THE CASE

A general summary of the proceedings below is found in the pending petition for writ of certiorari. The following statement relates only to the question presented in this Supplement.

At their arraignment on October 10, 1979, petitioner Bendetti and his co-defendants, Mastro and DeLamos, requested that Oscar B. Goodman, Esquire, be permitted to represent the three of them. At that time, the district judge conducted a hearing in which he "thoroughly covered the dangers and risks of multiple representation." 498 F. Supp. at 451; p. 1a, *infra*. Each defendant indicated that he wanted Mr. Goodman to represent him despite the potential conflicts of interest. *Id.* The Government opposed the defendants' request for joint representation. At a later hearing on November 5, 1979, the

district court ordered that each defendant obtain separate counsel by November 19, 1979, and that "each such separate counsel * * * evaluate the case of his client and determine whether Mr. Goodman's continued representation of the three defendants through the pre-trial phases of this matter constitutes a conflict of interest * * *." *Id.* at 453; p. 6a, *infra.*

On December 10, 1979, the district court held another hearing, attended by defendants and their separately retained counsel, at which the joint-representation issue was discussed. At the conclusion of the December 10 hearing, the district court permitted Mr. Goodman to participate in the pretrial proceedings only in a limited adviser or "general counsel" role, and reserved the question whether the court would permit him to appear in any capacity at all at trial. *Id.* at 454; p. 9a, *infra.* The district judge further stated that he would allow defendants an opportunity to be heard at the time of trial in the event that they renewed their application to have Mr. Goodman appear jointly for all three of them. *Id.* at 454-55; p. 10a, *infra.*

Seven months later, on July 29, 1980, defendants' separately retained counsel appeared before the district court and again raised the question of Mr. Goodman's participation at trial. *Id.* at 455; p. 11a, *infra.* Defendants' counsel made clear that "[d]efendants all want [Mr. Goodman] in the case * * *. The defendants want to know * * * why, first of all, they can't have one attorney represent them, since it's what they wanted from the beginning * * *." Tr. July 29, 1980, p. 17. The court's ruling—as explained in its later written opinion—did not permit Mr. Goodman to replace the three separately retained counsel; it did not permit Mr. Goodman to make a joint opening statement or joint summation for the three defendants; and it allowed Mr. Goodman to examine witnesses only on technical matters

and only if all separate counsel as well as all defendants agreed that he could best handle a particular witness or legal argument. 498 F. Supp. at 456-57; p. 15a, *infra*.

Defendants filed a notice of appeal on August 28, 1980, from the district court's ruling refusing to permit Mr. Goodman to participate fully in all stages of the trial on behalf of all three defendants. A motion for stay of proceedings pending this appeal was filed in the district court on August 29, 1980, and was granted on September 3, the same day the district court entered a written opinion on the joint-representation issue. In that opinion, the court recognized that defendants ordinarily should be permitted to have counsel of their choice. *Id.* at 456; p. 13a, *infra*. Nonetheless, the court concluded that defendants would be "far better represented by separate and independent counsel," and that it was not satisfied that defendants' waiver of the potential conflicts of interest was a knowing and intelligent one. *Id.*

The issue was presented to the court of appeals on interlocutory appeal, and the court affirmed by order on January 19, 1981.[1] A timely petition for writ of certiorari was denied by this Court, 452 U.S. 938 (1981) (No. 80-1615), and the case proceeded to trial.

At trial, defendants were represented by their separate counsel. As set out in the pending petition for writ of certiorari, defendants were convicted on multiple counts, and the court of appeals affirmed. The joint-representation issue was not raised by defendants on their post-conviction appeal.

---

[1] The court of appeals apparently entertained the appeal as an interlocutory appeal of a collateral order pursuant to 28 U.S.C. § 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *United States* v. *Flanagan*, 679 F.2d 1072, 1073 n.1 (3d Cir. 1982), *cert. granted*, No. 82-374, 51 U.S.L.W. 3508 (Jan. 10, 1983), and cases cited therein.

REASONS FOR GRANTING THE WRIT

As the accompanying motion explains, this case presents a question essentially identical to the issue on which this Court granted a petition for writ of certiorari to review in *Flanagan* v. *United States*, No. 82-374, 51 U.S.L.W. 3508 (Jan. 10, 1983), *decision below*, 679 F.2d 1072 (3d Cir. 1982). This question is whether, under the Fifth and Sixth Amendments to the Constitution and Fed. R. Crim. P. 44(c), a trial court may deny defendants joint representation by counsel of their choice despite an otherwise valid waiver by each defendant of potential conflicts of interest. The *Flanagan* petition demonstrated that the circuits are in conflict on this issue, and petitioner will not repeat those arguments here.

As petitioner now demonstrates, there is no material distinction between the issues presented by the instant case and by *Flanagan*, and, in any event, *Flanagan* is potentially dispositive of the instant case. Certiorari should be granted and this case should be set for argument with *Flanagan*. Alternatively, this case should be held pending decision in *Flanagan* and, if the judgment in *Flanagan* is reversed, certiorari should be granted and this case should be reversed and remanded for reconsideration in light of *Flanagan*.

In *Flanagan*, the four defendants chose to present a common defense to the conspiracy charge against them, and retained the same law firm to represent them. 679 F.2d at 1073. At the Government's request, the district court conducted a hearing to determine whether defendants were aware of the risks of joint representation and of their rights to separate representation. *Id.* The court found that defendants had been apprised by their lawyer of the potential risks associated with joint representation, and then questioned each defendant to ascertain whether he understood those risks. *Id.* It was determined that each defendant understood the potential

conflicts of interest presented by joint representation, and that each defendant knowingly and intelligently had chosen to waive any claim of conflict of interest. *Id.* Nonetheless, because the court also found that a conflict of interest was very likely to arise in the course of the proceedings, it held that defendants' waivers did not have to be accepted. Relying on Fed. R. Crim. P. 44(c), the court ordered that the defendants' chosen lawyer be disqualified from representing any of them. The defendants appealed this adverse ruling, and the United States Court of Appeals for the Third Circuit affirmed. *Id.*

While the *Flanagan* court completely barred defendants' chosen lawyer from representing any of them during pretrial and trial proceedings, the district court here authorized Mr. Goodman to participate only in a limited role at trial. Nonetheless, the issue presented in *Flanagan* and in this Supplement is whether a district court may interfere in any substantial fashion with defendants' choice of counsel once otherwise valid waivers of potential conflicts of interest have been expressed. Petitioner and his co-defendants sought full representation by Mr. Goodman at trial, not the limited involvement authorized by the district court.

Furthermore, while the *Flanagan* trial court found that defendants had made an otherwise knowing and intelligent waiver of potential conflicts of interest, the district judge here stated that he "cannot say that the 'waivers' made by the defendants Bendetti, Mastro and DeLamos are knowledgeable and intelligent under *Johnson* v. *Zerbst*, 304 U.S. 458 * * * (1938)." 498 F. Supp. at 455; p. 12a, *infra.* If that ruling were in fact independent of the district judge's own assessment of the potential for conflicts of interest and if it were supported by adequate findings and evidence, it might distinguish this case from *Flanagan.* But it was neither. The court clearly felt—and repeatedly stated—that defendants would be better served by each having his own separate and independent

counsel. *Id.* at 455-56; pp. 12a-14a, *infra*.[2] Moreover, its opinion lacks any basis for a determination that defendants had not knowingly and intelligently waived the potential conflicts of interest presented by joint representation. Indeed, the facts as presented by the court, viewed in light of the standards of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), show otherwise.

As recognized in *Johnson* v. *Zerbst*, *supra*, the determination whether a defendant has made a knowing and intelligent waiver with respect to a right-to-counsel question must in each case depend upon the particular facts and circumstances, including the background, experience, and conduct of the defendant. 304 U.S. at 64. In this case, as stated above, the trial court "thoroughly covered the dangers and risks of multiple representation"

---

[2] The court stated:

> "There can be no doubt that at trial these defendants are better served by each having his own separate and independent counsel. * * *
>
> "Indeed, given what is so obvious to me, and was accepted by Goodman and the defendants in November, I am mystified by the desire that Goodman be permitted to take over the defense of all three of these defendants. * * * Finally, in situations of multiple representation, the district judge is handicapped by the restrictions upon his ability to explore into the defenses of each defendant * * *.
>
> "* * * *
>
> "Yet I cannot escape the persistent notion that there is more here than meets the eye. Why, I must ask, do all the defendants want Goodman to represent them at every trial stage when it is so clear that their interests are better served by each having his own separate and independent counsel?"
>
> "* * * *
>
> "* * * I can say that defendants, at trial, will be far better represented by separate and independent counsel than by Goodman."

498 F. Supp. at 455-56; pp. 12a-14a, *infra*.

with each defendant. 498 F. Supp. at 451; p. 1a, *infra*. There is nothing in the record to indicate that the background, experience, or conduct of any of the defendants would allow for other than a knowing and intelligent waiver once they were apprised by the court of the potential conflicts of interest. Moreover, for at least 10 months prior to the filing of the district court's final ruling on the joint-representation question, each defendant had been represented and advised by separately retained counsel. *Id.* at 453-55; pp. 7a-9a, *infra*. Indeed, the court stated that it "accepted" the assurances of those counsel that each "has substantial experience in trying criminal cases." *Id.* at 454; p. 10a, *infra*. It seems apparent, then, that the district court in this case improperly substituted its views regarding joint representation for those of defendants, and did not feel bound to accept a knowing and intelligent waiver of potential conflicts of interest by separately represented defendants.

Any doubts that the court's waiver finding was not in fact separate from the trial judge's own views about joint representation are dispelled by that judge's expressed views in an earlier case, *United States* v. *Garafola*, 428 F. Supp. 620 (D.N.J. 1977), which he cited in the opinion below (498 F. Supp. at 455 & 456; pp. 11a & 13a, *infra*.) In the *Garafola* decision, he stated that "[t]here can be no real waiver" of the potential conflicts of interest arising from joint representation. 428 F. Supp. at 624.[3]

---

[3] The district court below also cited *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), for the applicable legal principles. 498 F. Supp. at 455; p. 11a, *infra*. There, the court of appeals stated:

> "More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him. * * * It may well be true, then, that in many cases the trial judge will not be in a posi-

Thus, if the *Flanagan* decision is reversed, and this Court rules that defendants may, in appropriate circumstances, waive the potential conflicts of interest posed by joint representation, then these defendants—separately represented by counsel at the time they sought joint representation—were improperly denied the right to joint representation by counsel of their choice, and the judgment of the court of appeals should be reversed.[4]

---

tion to accept a waiver of effective assistance of counsel. [Footnoted omitted, citing *United States* v. *Garafola, supra.*]

"* * * *

"Finally, exercise of the court's supervisory powers by disqualifying an attorney representing multiple criminal defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate defendant's sixth amendment rights." 570 F.2d at 1181-82.

The Government relied on *Garafola* and *Dolan* in its Brief for Appellee in the court of appeals, and *Dolan* was relied upon by the court of appeals in deciding *Flanagan*. See 679 F.2d at 1075 & 1076. This interrelationship of decisions demonstrates that a decision by this Court in *Flanagan* is likely to be dispositive of the joint-representation issue in this case.

[4] The fact that petitioner did not raise the question presented in this Supplement on his post-conviction appeal should not bar this Court's consideration of that question. While the general rule is that issues neither raised before nor considered by the court of appeals ordinarily will not be considered by this Court, *e.g., Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), that rule is inapplicable here. As explained above, the district court's ruling denying defendants joint representation by counsel of their choice was appealed before trial by defendants. When the court of appeals affirmed, defendants presented the question to this Court by a petition for writ of certiorari, and the Court denied that petition. Thus, this is not a case where the question here presented was never raised before nor considered by the courts below; nor is it a case in which no record exists. The fact that petitioner did not present the same question a second time on appeal should not prejudice this Court's consideration of that question after the Court has subsequently granted certiorari on another decision presenting that question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted on the question presented by this Supplement. Alternatively, the petition should be held pending decision in *Flanagan* v. *United States*, No. 82-374, and, if the judgment in *Flanagan* is reversed, the petition should be granted, the judgment below reversed, and the case remanded for further proceedings in light of *Flanagan*.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Petitioner

February 4, 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Criminal No. 79-321

UNITED STATES OF AMERICA

v.

PAUL BENDETTI, DENNIS MASTRO, PETER DELAMOS, and JAMES VITO MONTEMARANO,
Defendants.

September 3, 1980

On October 10, 1979, six defendants in the above-captioned matter were arraigned before this court. On the motion of Elliott H. Vernon, Esq,. Oscar B. Goodman, Esq., was specially admitted to this district in order that he be permitted to represent three of the defendants: Paul Bendetti, Dennis Mastro and Peter DeLamos. After all of the defendants were arraigned, pursuant to *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973), I conducted an inquiry concerning the advantages, disadvantages and conflicts of interest arising from Mr. Goodman's joint representation of the three.

This *Hart v. Davenport* hearing was conducted on October 10, 1979. Tr. 14 *et seq.* I thoroughly covered the dangers and risks of multiple representation. Each defendant, *Id.* 39, indicated he wanted Goodman to represent him during the pretrial stage.

Significantly, I pointed out the dangers in three defendants, charged as here with conspiracy, having the same counsel. *Id.*, 19-20. Goodman responded that he was aware of the problem and said:

> . . . it would be my intention, your Honor, that if this court would permit me to remain in the case

> that at the time of trial each of the defendants would be represented by separate counsel.

Tr. 20, lines 16-19.

Goodman held out to me that as an attorney from Las Vegas he was able to provide the defendants during the pretrial stage expertise other counsel lacked:

> . . . I have found throughout the years that gentlemen who are associated with Las Vegas, who are represented by attorneys who do not come from Las Vegas, when those gentlemen are charged with cases involving Nevada law, involving casinos, involving skimming, involving hidden ownership, that the attorneys who don't live there have done their clients a disservice by taking those cases because they're unable to relate to the jury the atmosphere and the flavor of Las Vegas and how business is done there.
>
> I would respectfully suggest to the court that with these gentlemen having independent counsel at the time of trial that certainly they would be entitled no less at this point in time to have a Nevada attorney who is familiar with Nevada rules and regulations and laws go through the pretrial matter. . . .

Id. 28, lines 2-16.

This intimation of expertise, accompanied by Goodman's reiteration of his recognition that each defendant should have independent counsel at trial, led me to conclude that hearing by permitting him to represent the three defendants [Bendetti, Mastro and DeLamos] at the arraignment. I stated:

> . . . based on all I've heard I will make a finding, a *Hart v. Davenport* finding that as I indicated in the *Garofola* opinion given the limits that are imposed upon my ability to inquire at this point I cannot say that there is a conflict in interest between the three defendants represented by Mr. Goodman, And, therefore, I will permit him to stay in the case.

In view of the extensive recordings counsel indicated were involved, I set a liberal motion schedule and a tentative trial date in January 1980.

At the conclusion of the October 10 hearing, Frederick Polak, Esq., the attorney for the United States, stated he would file a formal notice of disqualification directed at Goodman. This led to another hearing, on November 5, 1979.

Polak there stated that he had been hampered in discussing immunity and cooperation with Goodman's clients because of the multiple representation. Tr. of November 5, 1979, 3; that Goodman represented an unindicted co-conspirator; that government information, made available to Goodman, indicated that his own clients saw themselves differing in their degrees of culpability; that it was impracticable to allow Goodman to make all the pretrial motion decisions and thus "lock in" the independent trial counsel Goodman had recognized would be necessary; and that the case was a complicated one, covering three years, over 100 overt acts, with the probability of numerous unforeseen developments during pretrial and trial. *Id.*, 3-6. Polak concluded:

> We believe that the longer Mr. Goodman is in the case the longer these defendants will be affected. To act now will save potential continuances, mistrials, perhaps appellate attacks, and permit an individual attorney representing each one of these defendants to review the discovery materials fully and make an independent determination of what motions they can make in the defendant's best interest.

Id. 6, lines 10-16.

Goodman once again emphasized his expertise in connection with "the Nevada situation," and that he "should be permitted to remain in the case if for no other reason at least until such time as the validity of the wiretaps is challenged." *Id.* 13, lines 12-18.

Once again he noted his understanding that Bendetti, DeLamos and Mastro would "have independent counsel representing their interests at the time of trial." *Id.* 13, lines 21-22. Goodman did not file a sworn denial of Polak's affidavit averring he, Polak, had discussed with Goodman granting immunity to one of his clients in return for getting his cooperation against the others. *Id.* 16-17. There was, however, this exchange:

> THE COURT: All right. I take it—and you told me that you have taken up with them the necessity that they will have to have separate counsel at trial.
>
> MR. GOODMAN: Absolutely.
>
> THE COURT: And they're agreeable to that?
>
> MR. GOODMAN: They are. I wouldn't let them do it any other way.

Id. 17, lines 9-15.

Thereafter I dictated the following into the record:

> I have read Court Exhibit 1 and Court Exhibit 2 [these were sealed at Goodman's request] and for the life of me I just cannot perceive how in the face of, A, the delicacies of the problem; B, the law as it stands today, and given the trend of—the direction of trend for tomorrow and everything we've covered at the last Hart hearing; and finally what's in these Court Exhibits 1 and 2 how Mr. Goodman wants to stay in this case. Compounding all of the problems that we have is the fact that *Mr. Goodman himself acknowledges that he can't try this case for three defendants, and each one has been so advised by him and each one has agreed that they would get separate counsel at trial.*
>
> Now, what's the consequence of that? I have been told in the papers submitted to me this is a case of unusual complexity. Figures like thousands of

hours of tapes have been thrown around this courtroom. I can perceive without exercising much imagination that when Mr. Goodman finally decided it was time to bow out and bring in trial counsel what would then happen? And rightly so. Trial counsel would say, "We can't be ready. This is a case of unusual complexity. There are thousands of hours of tapes that we're going to have to listen to. There are thousands of documents in Nevada and here that we're going to have to examine. Judge, our clients have a Sixth-Amendment right to have counsel represent them who are familiar with the case. And while we have a great deal of respect for Mr. Goodman, his reputation has preceded him here, nonetheless we have to do this job independently."

Now, if Mr. Goodman wants to stay in this case as sort of a general counsel for these three defendants, founded upon his knowledge of the peculiar features of the case that he feels enable him to serve the three people so well, he's going to have to do this as well. Each one now is going to have to get separate counsel and then the assessment can be made by each of the individual counsel as to the extent to which Mr. Goodman can remain in the case representing the three defendants.

And on that basis, Mr. Goodman, I will permit you to remain in the case.

MR. GOODMAN: Very good.

THE COURT: On any other basis I will not be able to do it.

MR. GOODMAN: That was anticipated, your Honor, and discussions have been ongoing with other counsel.

THE COURT: All right. And I will direct further that given all of the problems of discovery in

this matter that that be done within the next two weeks.

And I think, Mr. Polak, you can discuss with Mr. Goodman the form the order should take. Do that out in the hall. Get the order prepared, get it submitted to me today and we'll get it filed. [emphasis supplied.]

Id. 35, line 5-37, line 3.

My reasoning was, as is reflected by the record, that the defendants would derive benefit from Goodman's claimed expertise in Nevada matters during pretrial but that each defendant would have to retain, then and there, counsel who would represent him at trial. Goodman's response, in the presence of Elliott H. Vernon, Esq. [who was retained shortly thereafter by DeLamos] and the three defendants [Bendetti, Mastro and DeLamos] indicates not only an understanding but an acquiesence in that ruling. An order was filed on November 5, 1979 as follows:

This matter having been opened to the Court by Frederick B. Polak, Special Attorney on behalf of the United States, for an Order disqualifying Oscar B. Goodman, Esq. from the representation of the three defendants Paul Bendetti, Dennis Mastro and Peter DeLamos.

IT IS on this 5 day of November, 1979,

ORDERED and ADJUDGED that each of the three defendants, Paul Bendetti, Dennis Mastro and Peter DeLamos are to obtain separate counsel in this matter by November 19, 1979; and it is further

ORDERED and ADJUDGED that each such separate counsel must evaluate the case of his client and determine whether Mr. Goodman's continued representation of the three defendants through the pretrial phases of this matter constitutes a conflict of interest; and it is further

ORDERED and ADJUDGED that such decision be made known to this Court as soon as practicable.

Following retention of separate counsel I held still another hearing on December 10, 1979, to assure that the representation as arranged protected the rights of the defendants and was free of conflict. Tr. of December 10, 1979, 12.

Vernon had originally appeared as local counsel, with Goodman, for all three defendants. Now he was representing only DeLamos. Questioning of the defendants and counsel for Bendetti and Mastro indicated there was, at this early juncture, no reason for not permitting Vernon to represent DeLamos. *Id.* 13, 16-17. *See* Vernon letter to the court, December 4, 1979, Court Exhibit 6.

Having approved Vernon's position as counsel for DeLamos, I put this question:

> THE COURT: All right. Now, is the fact that Mr. Goodman remains in the case to represent all three of the defendants in some manner that I have not yet penetrated to, is that acceptable to you?
>
> MR. VERNON: It certainly is, your Honor. I perceive no conflict. He's here as a general counsel predicated upon the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada.

Id. 17, lines 13-20.

Further questioning elicited that Frank T. Swain, Esq., had represented DeLamos in a state investigation in New Jersey at the request of Goodman. Counsel and the parties, however, assured me that they consented to his representing Bendetti here; and I saw no basis, in the record before me, for barring Swain.

Next, I asked each counsel to state what he perceived Goodman's role to be. While each counsel asserted he had considerable criminal trial experience, it appeared each

felt that Goodman's presence, even at trial, as a sort of adviser or "general counsel," was deemed desirable because of his experience in "Las Vegas gaming," "RICO wiretapping," and, as noted by Vernon, "the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada." *Id.* 17, 21.

Nonetheless, counsel indicated they would not be displaced by Goodman:

> THE COURT: Who's going to make the final decision on what your client—what is best for your client, you or Mr. Goodman?
>
> MR. VERNON: My client is going to make that decision.
>
> THE COURT: Who gives him the advice?
>
> MR. VERNON: I will give him the advice.
>
> THE COURT: And not Mr. Goodman?
>
> MR. VERNON: Not Mr. Goodman.

Id. 20, lines 3-11.

John J. Momot, Esq., essentially saw Mr. Goodman's role as I have just defined it:

> The case deals with many issues dealing with RICO wiretapping and gaming regulations in which I, knowing Mr. Goodman for many years, recognize that he is very, very well-qualified in this area and I personally would be looking to him for expertise in this area to assist in my representation of Mr. Mastro during the coming motions and trial itself.
>
> THE COURT: You don't feel qualified to do it without Mr. Goodman's help?
>
> MR. MOMOT: I do feel qualified; however, I do understand his expertise in this area—
>
> THE COURT: In what area?

MR. MOMOT: Especially gaming, your Honor.

THE COURT: You mean Las Vegas gaming, Nevada gaming?

MR. MOMOT: Las Vegas gaming, yes, your Honor. And I think he would be of great assistance not only to counsel involved in this matter but to any and all defendants.

THE COURT: Mr. Swain.

First, let me just ask Mr. Momot one question. Excuse me just a minute.

MR. MOMOT: Yes, sir.

THE COURT: As you heard his role stated by Mr. Vernon, is that your understanding as well?

MR. MOMOT: That is my understanding, your Honor.

Id. 20, line 22, to 21, line 22.

I concluded the hearing by dictating the following into the record:

> Now, with respect to Mr. Goodman, let me say this. Given the responses I have received I will permit Mr. Goodman to remain in the matter in the role, Mr. Goodman, as you have described that role up to the point of trial. I will reserve at this point on whether I will permit him to appear at trial. I'm doing this for two reasons. First, I want to be sure that at the time trial begins, if, as you put it, it reaches that stage, all counsel and the three defendants will have an opportunity once again to express to me what their thinking is as regards Mr. Goodman appearing at trial and representing all three of the defendants.
>
> Secondly, I want to be in a position to say at that point that based upon the case as I know it and as I hear about it from counsel at that point, that there is

in fact nothing but good that can flow to each of those defendants from having Mr. Goodman appear in the role as has been defined for him by you here today.

Among the factors I will have to consider at that time will be what may be the appearance to a jury of Mr. Goodman appearing for all three of those defendants.

Now, this means, therefore, since I am reserving on this at this point, that each of the three counsel that represents the three individual defendants here today will have to be prepared to the hilt to go forward without any assistance from Mr. Goodman at trial in the event I judge that to be necessary.

I am assured by each one of the three of you that you are, in fact, qualified by virtue of your own experience to handle these cases in the event Mr. Goodman should be barred. Each of you has told me he has substantial experience in trying criminal cases and I'm satisfied with your assurances. I accept those assurances and I am satisfied with them.

I do not see the potential for harm in Mr. Goodman remaining in the case through the pretrial stages that I perceive there may be in his appearing at trial for the three defendants. But I am not ruling him off the reservation for trial. I'm simply reserving on it at this point. And I will, of course, hear from each of the defendants and from counsel at the time of trial in the event you renew your application at that point to have Mr. Goodman appear for all three of the defendants at trial.

Id. 30, line 13, to 32, line 4.

Thereafter, pretrial matters unfolded and the case was set for trial on September 10, 1980 as defendants required additional time to prepare.

On July 29, 1980, counsel were before me on various matters and the question of Goodman's participation at trial was raised. One issue related to the defense designation of the electronic tapes they intended to use at trial. I had ordered that this information be furnished so that questions of audibility and authentication could be resolved before trial.

One defense counsel stated that the tapes were in Las Vegas and "until the government puts its case in or commences this case, we don't know what tapes we're going to utilize." Tr. of July 29, 1980, 10, lines 16-17.

I stated that I had long ago required the government to provide copies of the recordings it was going to use, with transcripts, that technical evidence matters were being heard on those pretrial, and that the defense had to respond in kind. I noted that the defense was not being asked to forego surprise—the tapes they had were furnished to them at my direction by the State of New Jersey in cooperation with the United States. *Id.* 9-11; 13-16.

Further, referring to the fact the tapes were in Las Vegas, I noted that I was holding New Jersey counsel responsible for conforming to my order. I extended the date for compliance to August 13, 1980.

Thereafter, I dealt with Goodman's trial status. Before dealing with what Goodman's role at trial is to be, a discussion of applicable legal principles is appropriate. No elaborate review is necessary.

Counsel have been referred by me to *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978) and *United States v. Garafola*, 428 F. Supp. 620 (D. N.J. 1977). I take it to be the law of this circuit that where the district court cannot satisfy itself that there has been a proper waiver of the Sixth Amendment right to effective assistance of counsel, he need not and, indeed, probably should not accept it. *United States v. Dolan, supra*, 570 F.2d at 1181.

I have meticulously probed into the matter on more than one occasion. Yet I cannot say that the "waivers" made by the defendants Bendetti, Mastro and DeLamos are knowledgeable and intelligent under *Johnson v. Zerbst*, 304 U.S. 458 (1938). The averments made by the United States on its motion heard last November have never been specifically denied. Moreover, the pretrial developments support the fact that these defendants may have differing interests and may have engaged in varying activity with respect to the principal government witness, the decedent Russo [whose testimony will be largely in the form of electronic recordings].

There can be no doubt that at trial these defendants are better served by each having his own separate and independent counsel. *Fryar v. United States*, 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969).

Indeed, given what is so obvious to me, and was accepted by Goodman and the defendants in November, I am mystified by the desire now expressed that Goodman be permitted to take over the defense of all three of these defendants. *See* Notice of Motion for Stay of Proceedings Pending Appeal, p. 2, indicating an appeal is being taken from my decision "refusing to permit Oscar B. Goodman, Esq., to participate in all stages of the trial of this matter on behalf of the defendants, Bendetti, Mastro and DeLamos. . . ." The situation is made even more puzzling by the fact that not once but several times Goodman agreed that, at trial, the defendants would have separate counsel, that they understood this, and that they were agreeable to this. Finally, in situations of multiple representation, the district judge is handicapped by the restrictions upon his ability to explore into the defenses of each defendant, the facts respecting each, what the government will offer as to each, what evidence will be offered by each, how each will want his defense conducted, how each will [with his counsel] want cross-

examination conducted of witnesses implicating him or of witnesses implicating co-defendants but not him.

The reasons for separate and independent counsel are stated in Geer, Conflict of Interests and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119 (1977).

Simply by way of example, if a government witness implicates defendant A, but not defendant B, what is their joint counsel to do? He must shake the witness' testimony as to A, perhaps even suggesting that the witness is not credible. On the other hand, must he not, at some stage, note that the witness has not implicated B?

In the face of the "stonewalling" here by Goodman, a district court is placed in a difficult position. Defendants ordinarily should be permitted to have counsel of their choice. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir. 1976). *Cf. Cuyler v. Sullivan*, 48 U.S.L.W. 4517 (U.S. May 12, 1980); *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979). Yet I cannot escape the persistent notion that there is more here than meets the eye. Why, I must ask, do all the defendants want Goodman to represent them at every stage when it is so clear that their interests are better served by each having his own separate and independent counsel?

This same nagging question has been dealt with in other places. *See United States v. Garafola*, *supra*, 428 F. Supp. at 624 n. 7 and 627, citing and quoting from a paper by Alan T. Cole, Esq., former chairman of the Section of Criminal Justice, American Bar Association; and *see* ABA Standards Relating to the Defense Function, § 3.5(b) at 159, 211, and 214. *See also*, *United States v. Quinones*, 613 F.2d 47 (3d Cir. 1980); *United States v. Provenzano*, 620 F.2d 985, 1004 (3d Cir. 1980).

While I cannot say that the reasons advanced in the Cole paper, as quoted in *Garafola*, are present here, I can say that defendants, at trial, will be far better repre-

sented by separate and independent counsel than by Goodman. I can also state that I cannot satisfy myself that their "waiver" is a knowing and intelligent one.

Accordingly, I will not permit Goodman to replace Vernon, Swain and Momot as counsel for the three defendants.

What role, if any, may Goodman perform at trial? Notwithstanding the fact that I have been given no specifics, as I was in connection with pretrial matters, the theme continues that Goodman has certain special expertise that defendants will require at trial, this notwithstanding Vernon, Swain and Momot are experienced in criminal defense work and were retained at a time when, as I have stated, the defendants and Goodman had agreed they would be trial counsel.

Nonetheless, I can accommodate the claimed necessity for Goodman's expertise with the defendants' right to separate and independent [and effective] counsel under the Sixth Amendment.

I will permit Goodman to continue in his role as counsel to the three defendants so that he will be available as an adviser to the three counsel when and if they need this aid. He can, of course, sit at counsel table to be readily available. I emphasize, however, that I regard Messrs. Vernon, Momot and Swain as counsel for DeLamos, Mastro and Bendetti, respectively. In this way I can assure that trial decisions made by a defendant and his counsel will be made not in the light of how they serve all three, but rather how they serve that particular defendant.

At the hearing on July 29, 1980, I was asked to detail specifically what Goodman would be permitted to do at trial, Tr. of July 29, 1980, 16, *et seq.* I have reviewed what I there stated; and now, upon reflection, believe amplification of my remarks is appropriate.

Opening Statements: It is impossible to predict at this stage whether one or all of the defendants may want to waive opening, and if they open what the opening should comprise. Nonetheless, it is clearly in the best interests of each defendant that his own lawyer open for him. Goodman will not be permitted to open jointly for the three defendants.

Summation: The procedure and the reasons therefor are as they are set forth under "Opening Statement." Indeed, common sense and experience dictate that at the conclusion of the trial each defendant will have, at the very least, different shades of emphasis on argument, if not totally different arguments, and in making such must have his own case presented undiluted by arguments from his counsel which are addressed to the case against—and for—the other defendants.

Witnesses: Much of this aspect has to be handled on an ad hoc basis, witness by witness. If a technical matter arises, e.g., an aspect of electronic surveillance, and all counsel and their clients are satisfied that Goodman can best handle direct or cross of that particular witness, I will, after appropriate inquiry, permit him to do so, acting for all three defendants, with appropriate instructions being given to the jury. If on cross, his examination will be in place of all three counsel, not in addition to the examinations performed by counsel.

Legal arguments: If all three defendants' counsel agree that a particular legal argument can be best presented by Goodman, and their clients agree, I will permit him to make such, again, where the jury is present, after appropriate instruction is given to the jury.

Submit an order conforming with the foregoing.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA

v.

PAUL BENDETTI, DENNIS MASTRO and PETER DELAMOS,
Appellants.

Appeal from the United States District Court
for the District of New Jersey

Before: WEIS and HIGGINBOTHAM, *Circuit Judges* and MCCUNE, *District Judge.**

After considering the contentions raised by appellants, to-wit, that the trial court denied the appellants their constitutional right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esquire, to participate in all stages of the trial of this matter, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Weis
Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

DATED: Jan. 19, 1981

---

* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA,
Appellee,

v.

PAUL BENDETTI, DENNIS MASTRO and PETER DELAMOS,
Appellants.

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*, and MCCUNE, *District Judge.**

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Weis
Judge

Dated: February 17, 1981

---

* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

Office-Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS,

No. 82-1051

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL BENDETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND ON MOTION FOR LEAVE TO SUPPLEMENT THE PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET I. MILLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in rejecting a plea agreement proffered by petitioner and the government.

In the supplement to the petition for a writ of certiorari, which petitioner moved on February 4, 1983 for leave to file, petitioner would enlarge the questions presented to include the following additional question:

2. Whether the district court improperly deprived petitioner, who was represented by separate counsel at trial, of a right to counsel of his own choosing by limiting the participation by another attorney on behalf of petitioner and his two co-defendants.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1	7
Confiscation Cases, 74 U.S. (7 Wall.) 454	7
Flanagan v. *United States*, petition granted, No. 82-374 (Jan. 10, 1983)	11, 12
Johnson v. *Zerbst*, 304 U.S. 458	15
United States v. *Agosto*, 675 F.2d 965, cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982)	12
United States v. *Ammidown*, 497 F.2d 615	6, 7, 8, 9
United States v. *Bean*, 564 F.2d 700	9
United States v. *Curcio*, 680 F.2d 881	11-12
United States v. *Escobar Noble*, 653 F.2d 34	9
United States v. *Garcia*, 517 F.2d 272	12
United States v. *Moore*, 637 F.2d 1194	9

Constitution, statutes and rules:

U.S. Const. Amend. VI	10, 12, 14
18 U.S.C. 2	2
18 U.S.C. 1952	2, 4
18 U.S.C. 1962(c)	2
18 U.S.C. 1964(e)	4
18 U.S.C. 2314	2
Fed. R. Crim. P.:	
Rule 11	4, 5, 8
Rule 11(e)	5

Constitution, statutes and rules—Continued Page

Rule 11(e)(1)(C) 4, 5, 6, 7, 8, 9
Rule 11(e)(2) 5
Rule 11 advisory committee notes 5, 8, 9

Miscellaneous:

H.R. Rep. No. 94-247, 94th Cong., 1st Sess. (1975) .. 6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1051

PAUL BENDETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND ON MOTION FOR LEAVE TO SUPPLEMENT THE PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals affirming petitioner's conviction (82-894 Pet. App. 1a-2a) is not reported.[1] The judgment order of the court of appeals on petitioner's pretrial appeal concerning joint representation (Supp. Pet. App. 16a) also is not

[1] Two co-defendants who were convicted along with petitioner, Dennis Mastro and Peter DeLamos, filed a separate petition for a writ of certiorari with this Court. *Mastro* v. *United States*, No. 82-894, cert. denied (Jan. 10, 1983). The judgment order of the court of apeals affirming the conviction of these three defendants is not included in petitioner's appendix but rather appears in the appendix in No. 82-894.

reported.[2] The opinion of the district court on the joint representation issue is reported at 498 F. Supp. 450.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1982. A petition for rehearing was denied on October 22, 1982. The petition for a writ of certiorari was filed on December 21, 1982, and on February 4, 1983, petitioner moved for leave to supplement his petition to enlarge the questions presented in the original petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to travel interstate and to use the telephone to promote a racketeering enterprise, in violation of 18 U.S.C. 1952 and 2314 (Count 1); conspiring to engage in a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c) (Count 2); and eleven counts of interstate travel and use of the telephone in aid of racketeering, in violation of 18 U.S.C. 1952 and 2 (Counts 3-10 and 12-14).[3] The court of appeals affirmed by judgment order (82-894 Pet. App. 1a-2a).

---

[2] "Supp. Pet." refers to a supplement to the petition for a writ of certiorari, which petitioner moved to file on February 4, 1983.

[3] Petitioner's co-defendants, Mastro and DeLamos, were also convicted of conspiring to violate 18 U.S.C. 1962(c) and on eleven counts of violating 18 U.S.C. 1952. Two other co-defendants, Ruggerio Boiardo and Philip Leone, were severed prior to trial. The district court acquitted a sixth defendant, James Vito Montemarano, of all charges at the close of the government's case (Tr. 1286). At the close of all the evi-

Petitioner was sentenced to concurrent terms of three years' imprisonment and fined $25,000 on Counts 1 and 2. He was sentenced to a concurrent three-year term and fined $10,000 on Count 3. The district court suspended sentence on the remaining counts and imposed a five-year term of probation to run consecutively to petitioner's sentence on Counts 1, 2 and 3 (82-1051 Pet. 3-4). The court of appeals affirmed (82-894 Pet. App. 1a-2a).

The evidence at trial showed that petitioner and co-defendants Dennis Mastro and Peter DeLamos owned and operated a Las Vegas casino in partnership with Anthony and John Russo and Ruggerio Boiardo (Tr. 297, 437, 545, 598-599). The Russo brothers and Boiardo had prior criminal records, and under Nevada law they could not be licensed to operate a casino (Tr. 148-149, 151, 157, 850, 1297, 1484, 1512-1516).[4] Petitioner owned 24% of the casino and oversaw its daily operations (Tr. 71-75; Gov. Exh. G551). Petitioner and his co-defendants concealed from state authorities the illegal ownership by Boiardo and the Russos (Tr. 414-415, 431, 448, 715-716, 930, 932, 989-990). These three "organized crime figures" helped petitioner and his co-defendants obtain loans (Tr. 481-482, 489-490, 517-518, 519-520, 541, 1779), obtain building permits without complying with local ordinances (Tr. 272, 541-542, 590-592, 618, 621-622, 915-918, 940-945), protect the casino from rival criminal groups (Tr. 273-274, 313,

---

dence, the court also acquitted petitioner, Mastro, and DeLamos on two counts of interstate transportation of money obtained by fraud (Counts 11 and 15) (Tr. 2268).

[4] Anthony and John Russo were unindicted co-conspirators. Both were deceased by the time of the indictment.

318-319, 495-496, 688, 694, 741), use the casino to place bets on outside sporting events (Tr. 456-458, 465, 603), control employee theft (Tr. 442-443, 611, 730-731), and collect gambling debts owed to the casino (Tr. 301, 349-351, 712-713, 845-846, 1767). In return, petitioner and his co-defendants shared the profits from the casino with the Russo brothers and Boiardo (Tr. 267, 290, 292, 294, 354-358, 363, 377, 385-387, 390-391, 393, 555, 565, 628, 659, 647-648, 700, 934-936, 1707-1708).

ARGUMENT

1. Petitioner contends (82-1051 Pet. 6-14) that the district court abused its discretion in rejecting a proffered plea agreement he negotiated with the prosecutor pursuant to Fed. R. Crim. P. 11(e)(1)(C). That provision of Rule 11 permits the government and the defense to enter into discussions with a view toward reaching an agreement under which the government agrees that a specific sentence is the appropriate disposition of the case.

The agreement involved in this case provided that petitioner and Mastro would plead guilty to one count of violating 18 U.S.C. 1952 and would receive a sentence of five years' probatio nand a fine of $10,000. In return, the government agreed to dismiss the remaining counts against petitioner at the time of sentencing. DeLamos agreed to plead guilty to a complaint filed by the State of Nevada charging him with violating the Nevada Gaming Control Regulations; in return, the government agreed to move to dismiss the federal indictment against him upon his sentencing in state court. In addition, petitioner and his two co-defendants agreed to execute a consent judgment in a civil RICO action under 18 U.S.C. 1964(e)

that would render them jointly and severally liable to divest themselves of $170,000 in profits and enjoin them from engaging in any casino gambling activities (82-1051 Pet. App. 7a-8a). The district court rejected the plea agreement (82-1051 Pet. App. 8a-11a), and petitioner was then tried and convicted.

Petitioner asserts that the district judge rejected the proposed plea agreement because, as a matter of policy, he would not accept any agreements pursuant to Fed. R. Crim. P. 11(e)(1)(C), which provides that the attorney for the government may agree that "a specific sentence is the appropriate disposition of the case." Petitioner contends that the district court may not reject a plea agreement on this basis. Contrary to petitioner's contention, however, Rule 11(e)(2) broadly provides that "the court may accept or reject the agreement" under Rule 11(e)(1)(C), without qualification as to the grounds for rejection. The advisory committee note on the 1974 amendments to Rule 11(e) emphasizes the district court's discretion in this regard, stating that "[t]he plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge."

Moreover, the legislative history of Congress's consideration of the 1974 amendments to Rule 11 makes clear that a district court indeed may refuse to accept proffered plea agreements. In describing the amendments to Rule 11, the House Committee Report states:

> The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning

> the disposition of the case. The procedure is not mandatory; *a court is free not to permit the parties to present plea agreements to it.*

H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 6 (1975) (emphasis added). The report continues (*ibid.*):

> Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements.

In a footnote, the Committee added (*id.* at 6 n.7a):

> Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it.

In support of his contention that a district court cannot systematically reject Rule 11(e)(1)(C) plea agreements presented to it, petitioner relies (82-1051 Pet. 7) exclusively on *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). In *Ammidown*, however, the plea agreement provided for the defendant, who had been charged with first degree murder, to plead guilty to second degree murder, and the first degree murder charge was then to be dismissed. The agreement did not provide for the prosecutor to recommend less than the maximum sentence of life imprisonment, under which the defendant, who was 49

years old, would not be eligible for parole for 15 years. Under the agreement in *Ammidown*, the defendant also was to testify before a grand jury and at trial against his accomplice, a much younger man who the government believed was involved in another murder. 497 F.2d at 618, 622-623. The district court refused to approve the agreement and accept the plea, despite the importance of the arrangement to the government, because it concluded that the public interest would not be served by a conviction of only second degree murder. The court of appeals reversed. It observed that whether a charge should be dismissed upon a determination that conviction of a lesser offense would adequately protect the public is a matter almost entirely within the discretion of the prosecutor and that the court should only rarely condemn the prosecutor's agreement in this regard. 487 F.2d at 620-622.

Thus, in *Ammidown* it could be said that the district court was entering into the domain of the prosecutor in determining what charges should be brought or pursued. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869). The government did not agree in *Ammidown* even to make a recommendation concerning a sentence less than the maximum for second degree murder; that case therefore did not impact upon the court's discretion to impose a sentence within the range established by law. By contrast, in a plea agreement under Rule 11(e)(1)(C), such as that involved here, the government and the defendant do agree that a particular sentence is the appropriate disposition of the case. Such an agreement therefore directly implicates the sentencing decision, which even the court in *Ammidown* recognized as within the discretion of the trial court. 497 F.2d at 619, 621.

There is, accordingly, less reason to believe that Congress would have intended to circumscribe the court's discretion as to such agreements. The instant case is therefore quite different from *Ammidown*.

Furthermore, as petitioner concedes (82-1051 Pet. 7), the District of Columbia Circuit in *Ammidown* was construing a prior version of Rule 11, which did not even contain any provision comparable to the present Rule 11(e)(1)(C). Since then, Congress has amended Rule 11, and as we have shown, the legislative history of those amendments clearly establishes that a district judge has discretion under the new Rule to refuse to accept a plea agreement of the type at issue here.

Petitioner acknowledges the legislative history discussed above, but he nevertheless argues (82-1051 Pet. 9) that this history is not as clear as its explicit terms indicate. He does not rely on anything in the legislative history itself in support of the supposed ambiguity that would limit the courts' discretion with respect to Rule 11(e)(1)(C) agreements. Rather he argues that *Ammidown* was "a controversial and well-publicized ruling by a distinguished federal judge," yet, he continues, neither the advisory committee notes nor the House Committee Report states that the amended rule was intended to repudiate *Ammidown*. From this, petitioner argues that the decision in *Ammidown* must still be accepted as valid law and that it renders the district court's action here invalid. This argument is without merit. As we have shown, the instant case is quite different from *Ammidown*, because the agreement here provided for a particular sentence. Even assuming that Congress intended to preserve the core principle of *Ammidown* that requires judicial deference where the interests of the prosecution, not the court, are primarily im-

plicated, that principle would not govern here. Although the advisory committee notes and congressional committee reports do not mention *Ammidown*, they do emphasize that the district court may decline to accept a plea agreement—thereby indicating at the very least that the holding in *Ammidown* should not be *extended* to Rule 11(e)(1)(C) agreements under the new rule.[5]

2. Petitioner sets forth at the beginning of his petition two additional questions presented (82-1051 Pet. i, Questions 2 & 3) that his co-defendants raised in

---

[5] Moreover, as petitioner acknowledges (82-1051 Pet. 9-11), the Fifth and Eighth Circuits have expressed the view that the legislative history of Rule 11(e) diminishes the precedential effect of *Ammidown*. See *United States* v. *Bean*, 564 F.2d 700, 703 n.4 (5th Cir. 1977); *United States* v. *Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981). Petitioner argues (82-1051 Pet. 11), however, that the First Circuit in *United States* v. *Escobar Noble*, 653 F.2d 34 (1st Cir. 1981), recently recognized "the continued validity of *Ammidown*." But in *Escobar Noble* the court simply cited but did not follow *Ammidown*. Instead, the First Circuit acknowledged that a trial court has "wide latitude" to reject a plea agreement and upheld the district court's rejection of the particular agreement in that case. In addition, the court in *Escobar Noble* distinguished *Ammidown* on grounds that are equally applicable here, stating (653 F.2d at 36):

> This is not a case where acceptance of the plea agreement is both reasonable and necessary to secure a legitimate and important prosecutorial interest. See *United States* v. *Ammidown* * * * (plea bargain enabled prosecutor to obtain critical testimony needed to convict an accomplice, and without seriously weakening sanctions that would be imposed on defendant).

Thus, there is no conflict between the First Circuit's decision in *Escobar Noble* and the decision below.

the petition in No. 82-894.[6] Petitioner does not adduce any argument in support of those claims or even advance them as independent reasons for granting his petition; he simply states in the conclusion to the petition (82-1051 Pet. 14) that the Court should grant his petition if it grants the petition in No. 82-894 on these two questions. Since the Court has already denied the petition for a writ of certiorari in No. 82-894, there is no occasion to grant the instant petition as to those issues.

3. a. On February 4, 1983, petitioner filed a motion for leave to supplement the petition for a writ of certiorari to raise an additional issue not presented in the certiorari petition itself: whether the trial court impermissibly denied him counsel of his choice at trial by not permitting one attorney, Oscar Goodman, to represent petitioner and his co-defendants. Petitioner's motion for leave to supplement his certiorari petition should be denied. The question petitioner seeks to present in the supplement was previously raised in a petition for a writ of certiorari to review

---

[6] The government waived its right to file a response in No. 82-894.

In Question 2, petitioner claims that the district court violated his Sixth Amendment right to confront witnesses against him by admitting evidence of tape recorded conversations between the defendants and three co-conspirators who did not testify at trial. (Two of the witnesses, the Russo brothers, were dead at the time of trial, and another witness, Boiardo, had been indicted along with petitioner, but his trial was severed because he was physically unable to stand trial (2/11/80 Tr. 5)). In Question 3, petitioner claims that he was deprived of a fair trial and due process by the erroneous admission of the tape recorded conversations. (The defendants contended at trial that their tape recorded statements were made involuntarily).

the court of appeals' rejection of this same claim on an interlocutory appeal, and the Court denied the petition on that occasion. 452 U.S. 938 (1981). As petitioner concedes (Motion vii), he did not again present this issue to the court of appeals on appeal from the judgment of conviction.[7] Moreover, because the precise issue he now seeks to raise had been raised at an earlier stage of the proceedings, petitioner cannot claim to have overlooked it at the time he filed his second certiorari petition.

Petitioner asserts (Motion vi) that the Court's granting of the petition for a writ of certiorari in *Flanagan* v. *United States*, No. 82-374 (Jan. 10, 1983), warrants permitting him to supplement his certiorari petition. However, the petition in *Flanagan* was filed on September 1, 1982, long before the instant petition was filed on December 21, 1982. Moreover, on November 26, 1982—almost a month before petitioner filed his certiorari petition—the United States filed a response to the petition in *Flanagan* acquiescing in certiorari because of the conflict between the Third Circuit's decision in that case (rendered on June 2, 1982) and the Second Circuit's decision in *United States* v. *Curcio*, 680 F.2d 881

[7] After the Court denied the petition for a writ of certiorari in 1981, the case proceeded to trial, at which petitioner and his co-defendants were represented by separate counsel. Soon after proceedings recommenced in the district court, that court held a hearing to resolve outstanding questions regarding the conduct of the trial. At this hearing, counsel for co-defendant Mastro indicated that Goodman was no longer representing the defendants and that trial counsel had for several reasons, including the potential conflict of interest, recommended to his client that Goodman discontinue his representation of the defendants (7/7/81 Tr. 5). Goodman did not participate in any further proceedings.

(2d Cir. 1982) (rendered on May 26, 1982), as well as the prior decisions in *United States* v. *Agosto*, 675 F.2d 965 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982), and *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Petitioner therefore had ample opportunity to take *Flanagan* and the circuit conflict into account when he filed his certiorari petition. Accordingly, the motion to supplement should be denied.

b. In any event, for the reasons stated more fully in our brief in opposition to the previous petition raising this issue (80-1615 Br. in Opp.), certiorari clearly is not warranted on the counsel-of-choice issue. Contrary to petitioner's contention (Supp. Pet. 8), this case is quite different from *Flanagan*, and accordingly it would not be affected even if this Court were to reverse the Third Circuit's decision in *Flanagan*. In *Flanagan*, the district court found that the defendants had knowingly and intelligently waived any Sixth Amendment rights arising out of a potential conflict of interest in their joint representation. In contrast, as we explained in the previous brief in opposition (80-1615 Br. in Opp. 7-11), this case simply does not raise the question whether a trial court may order the disqualification of an attorney because of conflicts of interest where the defendants knowingly and intelligently waive their rights. As petitioner concedes (Supp. Pet. 7), the district court in this case stated that it could *not* find that petitioner and his co-defendants had knowingly and intelligently waived their rights to conflict-free representation (Supp. Pet. App. 12a)—and conflicts were conceded to exist by their joint counsel, Oscar Goodman, in October and November 1979, long before trial, at

which time Goodman further conceded that petitioner and his co-defendants would require separate counsel by the time of trial (80-1615 Br. in Opp. 2-4; 10/10/79 Tr. 19-20, 35; 11/5/79 Tr. 13, 17).[8] It could not seriously be contended that the district court was required to permit joint representation by Goodman in the absence of such a waiver.

Petitioner suggests (Supp. Pet. 7-9) that the district court was wrong and that there was in fact a knowing and intelligent waiver in this case. But peti-

---

[8] The issue at the October and November 1979 hearings was whether Goodman would be permitted to remain in the case prior to trial to assist separate counsel with matters relating to Nevada gambling laws. At the October hearing, Goodman stated (9/10/79 Tr. 20):

> It would be my intention, your Honor, that if this Court would permit me to remain in the case that at the time of trial each of the defendants would be represented by separate counsel.

Somewhat later in the hearing Goodman added (*id.* at 28):

> I would respectfully suggest to the court that with these gentlemen having independent counsel at the time of trial that certainly they would be entitled to no less at this point in time to have a Nevada attorney who is familiar with Nevada rules and regulations and laws go through the pretrial matters.

At the November hearing he said (11/5/79 Tr. 13):

> I have discussed with the three defendants, Mr. Bendetti, DeLamos and Mastro, that it's going to be necessary to have independent counsel representing their interests at the time of the trial. However, at the same time because of the cost factors and the considerations as to the unusual nature of the indictment involving Nevada, they continue to ask me to remain as their counsel for purposes of at least litigating the electronic surveillance in the case.

tioner points to no place in the record at which petitioner waived his Sixth Amendment right to conflict-free representation. Petitioner's argument is instead based (see Supp. Pet. 8-9) solely on inferences of a knowing and intelligent waiver he would draw from the district court's exploration of the dangers and risks of joint representation [9] and the fact that each

---

[9] The discussion at the October 1, 1979 hearing relied upon by petitioner (Supp. Pet. 3, 8) necessarily referred only to Goodman's role *prior* to trial (Supp. Pet. App. 1a), because Goodman already had conceded that separate counsel would be necessary at the trial itself. See pages 5, 12-13 and note 8 *supra*. Because Goodman did not seek to appear in the case after this Court denied certiorari, it is not clear to what extent he would have been permitted to participate under the district court's order or that he was prepared to assume an active role in the case.

At the July 29, 1980 hearing, co-defendant DeLamos' new counsel asserted that Goodman, who was not present at the hearing, was prepared to execute an affidavit stating that he then perceived no conflict in representing all three defendants at trial (7/29/80 Tr. 17). Goodman, however, neither filed such an affidavit nor otherwise personally disavowed his previous acknowledgements that he could not appropriately represent all three defendants at trial. Moreover, attorney Vernon, counsel for co-defendant DeLamos, noted at the July hearing that the defendants had acceded to and did not at that time question the propriety of the requirement that they have individual counsel at trial along with Goodman (7/29/80 Tr. 18). Later, Vernon indicated that DeLamos might want Vernon to withdraw completely, in favor of Goodman (*id.* at 24, 28, 32, 35), but subsequently he stated that the defendants were not seeking to give up the benefits of separate counsel (*id.* at 39). No similar suggestion of a possible desire for joint representation exclusively by Goodman was made on behalf of petitioner. Under these circumstances, the district court clearly was correct in determining that the defendants had not adequately waived their right to effective, conflict-free counsel at trial.

defendant was represented by separate counsel after it was clear that Goodman would not represent them at trial. The latter factor, petitioner appears to argue, suggests that petitioner and the others were adequately advised about their rights in connection with the joint representation. Such inferences obviously are insufficient to satisfy the waiver standards of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), upon which petitioner relies (Supp. Pet. 8), and are even more inadequate as a basis for attacking the district court's explicit finding that petitioner and his co-defendants had *not* made a knowing and intelligent waiver (Supp. Pet. App. 12a). The court of appeals did not disturb this finding when it affirmed the district court's decision on petitioner's first appeal (*id.* at 16a), and that court had no occasion to revisit the issue on the second appeal because petitioner did not renew the issue. Nor does petitioner suggest that he was prejudiced by not being represented by Goodman. Especially in these circumstances, and in the absence of an adequate record to further illuminate the waiver question, there is no occasion for this Court to review the question of waiver.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to supplement the petition should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET I. MILLER
Attorney

MARCH 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 401460 1307

Office - Supreme Court, U.S.
FILED
APR 11 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1051

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

PAUL BENDETTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and on Motion for Leave to Supplement the Petition for Writ of Certiorari

REPLY BRIEF FOR PETITIONER

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioner

April 11, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Faretta v. *California*, 422 U.S. 806 (1975) 4, 5
Flanagan v. *United States*, No. 82-374, *cert. granted*, 51 U.S.L.W. 3508 (U.S. Jan. 10, 1983) .. 3, 4, 5
United States v. *Agosto*, 675 F.2d 965 (8th Cir. 1982) 4
United States v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) 1, 2
United States v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975) 4
United States v. *Cunningham*, 672 F.2d 1064 (2d Cir. 1982) 4
United States v. *Curcio*, 680 F.2d 881 (2d Cir.), *on further appeal*, 694 F.2d 14 (2d Cir. 1982) 4, 5
United States v. *Garafola*, 428 F. Supp. 620 (D.N.J. 1977), *aff'd sub nom. United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978) 3
United States v. *Garcia*, 517 F.2d 272 (5th Cir. 1975) 4

Constitutional and Statutory Provisions:

U.S. Const. amend. VI 3
Fed. R. Crim. P. 11(e)(1) 1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1051

PAUL BENDETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and on Motion for Leave to Supplement the Petition for Writ of Certiorari

---

REPLY BRIEF FOR PETITIONER

---

1. With respect to the Rule 11(e)(1)(C) plea bargain issue, the Government attempts to distinguish *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), on the ground that the case "did not impact upon the court's discretion to impose a sentence within the range established by law." (Opp. at 7.) This is a distinction without a difference, since it is both obvious and widely acknowledged that the Government can severely limit a judge's sentencing discretion by the selection or dismissal of charges, as occurred in *Ammidown*. None of the cases cited in the petition or in the brief in opposition adopts the Government's proposed distinction.

The Government further argues: "Even assuming that Congress intended to preserve the core principle of *Ammidown* that requires judicial deference where the interests of the prosecution, not the court, are primarily implicated, that principle would not govern here." (Opp. at 8-9.) But the Government cannot seriously contend that the prosecution does not have a substantial interest in avoiding the expenditure of scarce resources in prosecuting cases where defendants are prepared to plead guilty and to accept a sentence satisfactory to the Government, as well as a substantial interest in encouraging investigative cooperation by entering into agreements like the one at issue here.[1] While the court may have an independent interest in fair and rational sentencing, the trial judge did not base his rejection of the plea on a finding that the proposed sentences were out of line with sentences it had imposed in similar cases. Accordingly, there is no basis for any assertion that the interests of the court were "primarily implicated." The question whether trial judges are authorized by Rule 11 to refuse to accept any Rule 11(e)(1)(C) pleas *as a matter of individual policy* deserves consideration by this Court.

2. The Government argues that petitioner's motion for leave to supplement the petition for writ of certiorari should be denied. The only reason given is that petitioner had "ample opportunity" to include in the original petition the issue raised by his supplement. (Opp. at 10-12). Nowhere does the Government contend that it will be prejudiced in any manner by the grant of petitioner's motion, nor could it so contend. Petitioner's motion for leave to supplement and the supplement itself were filed on February 4, 1983, less than seven weeks after the petition and some two weeks before the initial due date for the brief in opposition that the Court requested the Govern-

---

[1] See the letter to the trial judge from the Government attorney setting forth the considerations supporting the plea agreement, including defendants' cooperation. Pet. at 1a-5a.

ment to file. Moreover, the Government does not dispute petitioner's assertion (Motion at vii; Supp. at 2) that there is no jurisdictional bar to this Court's consideration of the supplement's additional question. Given these unusual circumstances, petitioner's motion for leave to supplement should be granted.

3. With respect to the joint representation question presented by petitioner's supplement, the Government opposes certiorari on the ground that the present case is quite different from *Flanagan* v. *United States*, No. 82-374, *cert. granted*, 51 U.S.L.W. 3508 (U.S. Jan. 10, 1983). (Opp. at 12-15.) That assertion is addressed in petitioner's supplement (at 6-10).

The Government further contends that "petitioner points to no place in the record at which petitioner waived his Sixth Amendment right to conflict-free representation." (Opp. at 13-14.) What the record shows, however, is that the defendants—represented by separate counsel—requested the right to be represented by Mr. Goodman, and the trial judge responded with repeated assertions that defendants "will be far better represented by separate and independent counsel than by Goodman." See Supp. at 8 n.2. If, as the Government states, there is "the absence of an adequate record to further illuminate the waiver question" (Opp. at 15), the trial judge contributed to that absence and, in any event, his statements at the hearing below and in his opinion in *United States* v. *Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977) (quoted in Supp. at 9), make clear that no more "adequate record" of a valid waiver would have convinced him to permit joint representation. See also *United States* v. *Curcio*, 694 F.2d 14, 27 (2d Cir. 1982), where the court of appeals reversed a trial court finding of no valid waiver of potential conflicts of interest, on a record of inquiry by the trial judge much more complete than occurred here, acknowledging that the trial judge "may have been led into error by trial counsel for the Govern-

ment's having furnished it with a copy of the Third Circuit's opinion in [*Flanagan.*]" [2]

The Government also contends, in a one-sentence assertion without citations, that certiorari should be denied because petitioner does not "suggest that he was prejudiced" by the district court's refusal to allow him and his co-defendants to be jointly represented by Mr. Goodman. (Opp. at 15.) But the circuit court decisions that conflict with *Flanagan* and find error in refusals to permit joint representation do not suggest that "prejudice" must be independently established, rather than presumed. See *United States* v. *Curcio*, 680 F.2d 881 (2d Cir.), *on further appeal*, 694 F.2d 14, 24-25 (2d Cir. 1982); *United States* v. *Cunningham*, 672 F.2d 1064 (2d Cir. 1982); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States* v. *Agosto*, 675 F.2d 965 (8th Cir. 1982). The right recognized in these cases, founded on the criminal defendant's personal right to manage his defense, is the right to employ counsel of his own choosing. This right is, therefore, substantially equivalent to the right of the accused to waive counsel altogether and represent himself. See *Faretta* v. *California*, 422 U.S. 806 (1975). As Judge Friendly wrote for the Second Circuit in *United States* v. *Curcio*, *supra*:

> "The choice of joint representation, like that of self-representation, is at once strategic and moral. * * *

---

[2] While the Government relies on the fact that "conflicts were conceded to exist by their joint counsel, Oscar Goodman, in October and November 1979, long before trial" (Opp. at 12), the critical hearing took place eight months later, in July 1980. At that hearing, as the Government concedes, one of defendants' separate counsel "represented that Goodman, who was not present at the hearing, was prepared to execute an affidavit stating that he then perceived no conflict in representing all three defendants at trial." (Opp. at 14 n.9; see Supp. at 4.) The trial judge did not rely on the lack of an affidavit or on Goodman's absence in denying joint representation, but on his own view that defendants would be better served by separate counsel.

> To be sure, the defendants' choice of joint representation, like that of self-representation, may sometimes seem woefully foolish to the judge. But the clear thrust of *Faretta* is that the choice is mainly theirs; the judge, much less the prosecutor, is *not* to assume too paternalistic an attitude in protecting the defendant from himself. * * * [T]he defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates. It is the defendants, not the judge or prosecutor, who 'will bear the personal consequences of a conviction.' *Faretta*, 422 U.S. at 834 * * *." 694 F.2d at 25.

If this Court decides in *Flanagan* that the trial judge has wide discretion to deny joint representation even in the presence of a valid waiver of potential conflicts, then the decision below may be unassailable on the joint representation issue; any other result in *Flanagan*, however, is likely to require reversal of the judgment below or at least a remand for further proceedings.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioner

April 11, 1983